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CASES DECIDED

ON THE

BRITISH NORTH AMERICA ACT, 1867,

IN

THE PRIVY COUNCIL, THE SUPREME COURT OF CANADA  
AND THE PROVINCIAL COURTS.

COLLECTED AND EDITED BY

JOHN R. CARTWRIGHT,

*One of Her Majesty's Counsel.*

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VOL. V.

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## PREFACE.

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The present volume contains the reported cases in the Privy Council and the Supreme Court of Canada in continuation of those previously published.

The method of arrangement adopted in the former volumes has been retained.

Where any part of a judgment is omitted the omission is marked by asterisks or otherwise, the matters omitted being such only as do not relate to the constitutional points. Square brackets thus [ ] shew that the words placed within them are introduced by the editor.

The numbers inserted in the margins refer to the pages of the original reports.

All quotations and references have as far as possible been verified and corrected.

NOVEMBER, 1897.





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PRIVY COUNCIL.

THE LIQUIDATORS OF THE MARITIME BANK OF CANADA,  
*Appellants*;  
AND  
THE RECEIVER-GENERAL OF NEW BRUNSWICK,  
*Respondent.*

J. O.\*

1892

May 11, 18.  
July 2.

*On appeal from the Supreme Court of Canada.*

[Reported [1892] A. C. 437.]

*Relations between Crown and Provinces—Winding-up of Bank—  
Priority of Provincial Government over other Simple Contract  
Creditors—Prerogative of the Crown.*

The British North America Act, 1867, has not severed the connection between the Crown and the Provinces; the relation between them is the same as that which subsists between the Crown and the Dominion in respect of the powers, executive and legislative, public property and revenues, as are vested in them respectively. In particular, all property and revenues reserved to the Provinces by sects. 109 and 126 are vested in Her Majesty as sovereign head of each Province.

*Held*, affirming a judgment of the Supreme Court of Canada, that the provincial government of New Brunswick, being a simple contract creditor of the Maritime Bank of the Dominion of Canada in respect of public moneys of the Province deposited in the name of the Receiver-General of the Province, is entitled to payment in full over other depositors and simple contract creditors of the bank, its claim being for a Crown debt to which the prerogative attaches.

Appeal from a judgment of the Supreme Court of Canada (Dec. 14, 1889), (1) affirming a judgment of the Supreme Court of New Brunswick (Oct. 19, 1888), (2) upon a special case submitted.

\**Present*:—LORD WATSON, LORD HOBHOUSE, LORD MACNAGHTEN, LORD MORRIS, SIR RICHARD COUCH, and LORD SHAND.

(1) 20 Can. S. C. R. 695; *post*, p. 11. (2) 27 N. B. Rep. 379; *post*, p. 19.

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 Statement.

Two questions were raised in the case, the material facts in which are stated in the judgment of their Lordships: First, was the Provincial Government entitled to payment in full by preference over the note holders of the bank; second, if not, was the Provincial Government entitled to payment in full over the other depositors and simple contract creditors of the bank.

The first Court answered both questions in favour of [438] the Provincial Government. The second Court decided the first question by a majority in favour of the appellants, by reason of the provisions of the 79th section of the Bank Act (Revised Statutes of Canada, c. 120). It decided the second question in favour of the respondent, holding in effect that the prerogative rights of the Crown could be invoked and exercised by and on behalf of the Provincial Government, which was, therefore, entitled to the priority claimed.

*The Attorney-General (Sir R. Webster), Stockton, Q.C. (of the New Brunswick Bar), and R. Brown for the appellants:—*

The prerogative rights of the Crown cannot be invoked and exercised by the Provincial Government, as distinguished from the Dominion Government. There is no section in the British North America Act of 1867 which gives this Crown right to the Province. Accordingly, if the Province possesses that right it must be on the general principle that the Lieutenant-Governor is entitled to exercise the prerogative of the Crown. But the effect of the Act of 1867 is that the Dominion Government represents the four Provinces existing at the time of the Union and other Provinces which were thereafter to be constituted; and, consequently, the direct connection between the Crown and the Provinces has



ceased. The Governor-General of Canada is the real representative of the Crown as the Dominion is at present constituted; and the Lieutenant-Governor of each Province is not. Certain portions of prerogative are given to the Lieutenant-Governors, and that is inconsistent with their representing the Crown entirely. Otherwise, if the Dominion and the Provinces both possess full prerogative rights you might have the Crown as representing the one contending with the Crown as representing the other. The judgment of Gwynne, J., in the Supreme Court was read and the reasoning therein contained adopted, it being suggested that sect. 92 of the Act should have been more emphatically relied on. Reference was also made to *Reg. v. Bank of Nova Scotia* (1); *Exchange Bank of Canada v. The Queen* (2); [439] *Mercer v. Attorney-General of Ontario* (3); *St. Catherine's Milling and Lumber Company v. The Queen* (4). If the Province as constituted under the Act of 1867 possesses all the rights which existed in the government of the colony before the Act, it is admitted that then it would have the same right of priority as the government had before the Act. But if the scheme of that Act was, as contended by the appellants, to establish a local executive and legislature under a Lieutenant-Governor who is appointed by the Governor-General, and not by the Queen, with functions different from the old government and legislature, and with powers limited and defined by statute and municipal in their general character, there is no reason why they should possess all the privileges and prerogatives as claimed, to be exercised concurrently, and sometimes it may be in conflict with the government of the Dominion.

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(1) 11 Can. S. C. R. 1; *ante*, vol. 4, p. 391.

(2) 11 App. Cas. 157.

(3) 5 Can. S. C. R. 538; 8 App. Cas. 767; *ante*, vol. 3, p. 1.

(4) 14 App. Cas. 46; *ante*, vol. 4, p. 107.

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Argument.

Sir *H. Davey*, Q.C., *Blair*, Q.C. (*Attorney-General for New Brunswick*), and *Ingle Joyce*, for the respondent:—

Sect. 64 of the British North America Act of 1867 enacts that, "the constitution of the executive authority in each of the Provinces of Nova Scotia and New Brunswick shall, subject to the provisions of this Act, continue as it exists at the Union, until altered under the authority of this Act." Before the Act of 1867 each Provincial Government exercised the prerogatives of the Crown. They are reserved to them by the Act. Sects. 64 and 65 read together mean that the powers and authorities vested in and exercised by the Provincial Government at the time of the Union should continue. These powers cannot be cut down except by express enactment, and there is nothing either in the Act of 1867 or in any subsequent Act which abolishes or alters them. According to the true effect of that Act the Provincial Governments and Legislatures are within their respective spheres supreme. They are not made in any way subordinate to the legislature and government of the Dominion. The intention was that the Dominion and the Provinces should have co-ordinate authority within their respective spheres, all subject to the control of the Imperial Parliament. Sect. 72 provides that Lieutenant-Governors [440] should appoint their councils in the Queen's name, and fill up vacancies therein in the same way (Sect. 75). Further the Provincial Legislatures are summoned in the name of the Queen (Sect. 82). Reference was also made to sects. 3 and 5 and to 109 and 126 of the Act of 1867; to *Hodge v. The Queen* (1); *Powell v. Apollo Candle Company* (2); *Theberge v. Landry* (3).

(1) 9 App. Cas. 117; *ante*, vol. 3,  
p. 144.

(2) 10 App. Cas. 282; *ante*, vol. 3,  
p. 432.

(3) 2 App. Cas. 102; *ante*, vol. 2, p. 1.



*Stockton, Q.C.*, replied.

The judgment of their Lordships was delivered by  
LORD WATSON:—

This appeal is brought by special leave in a suit which followed upon a case submitted for the opinion of the Supreme Court of the Province of New Brunswick, by the appellants, the liquidators of the Maritime Bank of the Dominion of Canada, in the interest of unsecured creditors of the bank, on the one side, and by the Receiver-General of the Province, claiming to represent Her Majesty, on the other. The only facts which it is necessary to refer to are these: that the bank carried on its business in the city of St. John, New Brunswick; and that at the time when it stopped payment in March, 1887, the Provincial Government was a simple contract creditor for a sum of \$35,000, being public moneys of the Province deposited in the name of the Receiver-General. The case, as originally framed, presented two questions for the decision of the Court; but, owing to the condition of the bank's assets, the first of these has ceased to be of practical importance, and it is only necessary to consider the second, which is in these terms: "Is the Provincial Government entitled to payment in full over the other depositors and simple contract creditors of the bank?"

The Supreme Court of New Brunswick unanimously, and, on appeal, the Supreme Court of Canada with a single dissentient voice, have held that the claim of the Provincial Government is for a Crown debt to which the prerogative attaches, and therefore answered the question in the affirmative.

[441] The Supreme Court of Canada had previously ruled, in *Reg. v. Bank of Nova Scotia* (1) that the

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~~APPEAL~~

*Judgment*

*Case*  
*stated*

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Crown, as a simple contract creditor for public moneys of the Dominion deposited with a provincial bank, is entitled to priority over other creditors of equal degree. The decision appears to their Lordships to be in strict accordance with constitutional law. The property and revenues of the Dominion are vested in the Sovereign subject to the disposal and appropriation of the Legislature of Canada ; and the prerogative of the Queen, when it has not been expressly limited by local law or statute, is as extensive in Her Majesty's colonial possessions as in Great Britain. In *Exchange Bank of Canada v. The Queen* (1) this Board disposed of the appeal on that footing, although their Lordships reversed the judgment of the Court below, and negatived the preference claimed by the Dominion Government, upon the ground that, by the law of the Province of Quebec, the prerogative was limited to the case of the common debtor being an officer liable to account to the Crown for public moneys collected or held by him. The appellants did not impeach the authority of these cases, and they also conceded that, until the passing of the British North America Act, 1867 there was precisely the same relation between the Crown and the Province which now subsists between the Crown and the Dominion. But they maintained that the effect of the statute has been to sever all connection between the Crown and the Provinces ; to make the Government of the Dominion the only Government of Her Majesty in North America ; and to reduce the Provinces to the rank of independent municipal institutions. For these propositions, which contain the sum and substance of the arguments addressed to them in support of this appeal, their Lordships have been unable to find either principle or authority.

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(1) 11 App. Cas. 157.



Their Lordships do not think it necessary to examine in minute detail, the provisions of the Act of 1867 which nowhere profess to curtail in any respect the rights and privileges of the Crown, or to disturb the relations then subsisting between the Sovereign and the Provinces. The object of the Act was neither to weld the Provinces into one nor to subordinate Provincial Governments to a [442] central authority, but to create a federal government in which they should all be represented, entrusted with the exclusive administration of affairs in which they had a common interest, each Province retaining its independence and autonomy. That object was accomplished by distributing between the Dominion and the Provinces all powers, executive and legislative, and all public property and revenues which had previously belonged to the Provinces, so that the Dominion Government should be vested with such of these powers, property, and revenues as were necessary for the due performance of its constitutional functions, and that the remainder should be retained by the Provinces for the purposes of provincial government. But, in so far as regards those matters which, by sect. 92, are specially reserved for provincial legislation, the legislation of each Province continues to be free from the control of the Dominion and as supreme as it was before the passing of the Act. In *Hodge v. The Queen* (1) Lord Fitzgerald, delivering the opinion of this Board, said: "When the British North America Act enacted that there should be a legislature for Ontario, and that its Legislative Assembly should have exclusive authority to make laws for the Province and for Provincial purposes in relation to the matters enumerated in sect. 92, it conferred powers not in any sense to be exercised by delegation from or as agents of the Imperial

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(1) 9 App. Cas. 117; ante, vol. 3, p. 144.

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Parliament, but authority as plenary and as ample within the limits prescribed by sect. 92 as the Imperial Parliament in the plenitude of its power possessed and could bestow. Within these limits of subject and area, the Local Legislature is supreme, and has the same authority as the Imperial Parliament, or the Parliament of the Dominion." The Act places the constitutions of all Provinces within the Dominion on the same level; and what is true with respect to the Legislature of Ontario, has equal application to the Legislature of New Brunswick.

It is clear, therefore, that the Provincial Legislature of New Brunswick does not occupy the subordinate position which was ascribed to it in the argument of the appellants. It derives no authority from the Government of Canada, and its status is in no way analogous to that of a municipal institution, which is an authority constituted [443] for purposes of local administration. It possesses powers, not of administration merely, but of legislation in the strictest sense of that word; and, within the limits assigned by sect. 92 of the Act of 1867, these powers are exclusive and supreme. It would require very express language, such as is not to be found in the Act of 1867 to warrant the inference that the Imperial Legislature meant to vest in the Provinces of Canada the right of exercising supreme legislative powers in which the British Sovereign was to have no share.

In asking their Lordships to draw that inference from the terms of the statute, the appellants mainly, if not wholly, relied upon the fact that, whereas the Governor-General of Canada is directly appointed by the Queen, the Lieutenant-Governor of a Province is appointed not by Her Majesty, but by the Governor-General who has also the power of dismissal. If the Act had not committed to the Governor-General the power of appointing



and removing Lieutenant-Governors, there would have been no room for the argument which, if pushed to its logical conclusion, would prove that the Governor-General and not the Queen, whose <sup>representative</sup> Viceroy he is, became the sovereign authority of the Province whenever the Act of 1867 came into operation. But the argument ignores the fact that, by sect. 58, the appointment of a provincial governor is made by the "Governor-General-in-Council by instrument under the Great Seal of Canada," or, in other words, by the Executive Government of the Dominion which is, by sect. 9, expressly declared "to continue and be vested in the Queen." There is no constitutional anomaly in an executive officer of the Crown receiving his appointment at the hands of a governing body who have no powers and no functions except as representatives of the Crown. The act of the Governor-General and his Council in making the appointment is, within the meaning of the statute, the act of the Crown; and a Lieutenant-Governor when appointed is as much the representative of Her Majesty for all purposes of Provincial government as the Governor-General himself is for all purposes of Dominion government.

The point raised in this appeal, as to the vesting or non-vesting of the public property and revenues of each Province in the Sovereign as supreme head of the State, [444] appears to their Lordships to be practically settled by previous decisions of this Board.

The whole revenues reserved to the Provinces for the purposes of provincial government are specified in sects. 109 and 126 of the Act. The first of these clauses deals with "all lands, mines, minerals, and royalties belonging to the several Provinces of Canada, Nova Scotia, and New Brunswick at the Union" which it declares "shall belong to the several Provinces

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of Ontario, Quebec, Nova Scotia, and New Brunswick, in which the same are situate or arise." If the Act had operated such a severance between the Crown and the Provinces, as the appellants suggest, the declaration that these territorial revenues should "belong" to the Provinces would hardly have been consistent with their remaining vested in the Crown. Yet, in *Attorney-General of Ontario v. Mercer* (1); *St. Catherine's Milling and Lumber Company v. The Queen* (2); and *Attorney-General of British Columbia v. Attorney-General of Canada* (3); their Lordships expressly held that all the subjects described in sect. 109 and all revenues derived from these subjects, continued to be vested in Her Majesty as the sovereign head of each Province. Sect. 126, which embraces provincial revenues other than those arising from territorial sources and includes all duties and revenues raised by the Provinces in accordance with the provisions of the Act, is expressed in language which favours the right of the Crown, because it describes the interest of the Provinces as a right of appropriation to the public service. And, seeing that the successive decisions of this Board, in the case of territorial revenues are based upon the general recognition of Her Majesty's continued sovereignty under the Act of 1867, it appears to their Lordships that, so far as regards vesting in the Crown, the same consequences must follow in the case of provincial revenues which are not territorial.

Being of opinion that the decisions of both Courts below were sound, and agreeing with the reasons assigned by the learned Judges, their Lordships will humbly advise Her Majesty to affirm the judgment appealed from and to dismiss the appeal. The appellants must pay to the respondent his costs of this appeal.

(1) 8 App. Cas. 767; *ante*, vol. 3, p. 1.

(2) 14 App. Cas. 46; *ante*, vol. 4, p. 107.

(3) 14 App. Cas. 295; *ante*, vol. 4, p. 241.

## JUDGMENTS IN SUPREME COURT OF CANADA.

[Reported 20 Can. S. C. R. 695.]

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Strong, J.

STRONG, J. :—

This case raises the same question as to priority which was raised in *The Maritime Bank v. The Queen* (1) and also another question. As to priority I refer, as in the former case, to *Reg. v. The Bank of Nova Scotia* (2). As to the second question, the right of a Province to exercise and enjoy this prerogative of the Crown, I adhere to what I said during the argument, that there can be no doubt that the Provinces have this right. I think the appeal should be wholly dismissed.

FOURNIER, J. :—

The questions raised on this appeal are as follows :—

1. Is the Provincial Government entitled to payment in full by preference over the note holders of the said bank ?
2. If not, is the Provincial Government entitled to payment in full over the other depositors and simple contract creditors of the bank ?

On the first I am of opinion that the appeal should be allowed, and on the second that it should be dismissed.

I fully concur in the reasons given by Mr. Justice Patterson in support of his conclusion. No costs should be given to either party.

TASCHEREAU, J. :—

As I have said in the preceding case I do not see it possible, in view of the wording of the Interpretation Act, to construe the Banking Act as excluding Her Majesty's prerogative rights. I think that the Crown has priority over the note holders.

The appeal on this point should be dismissed.

As to the question whether the Provincial Government is entitled [698] to preference over the other creditors of the bank, I would also dismiss the appeal and answer this question in the affirmative as it has been in the Court below. In my opinion under the British North America Act the executive power in the Provinces is, as a general rule, vested with the same rights and privileges in the

(1) 17 Can. S. C. R. 657 ; *ante*, vol. 4, p. 409.

(2) 11 Can. S. C. R. 1 ; *ante*, vol. 4, p. 391.



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administration of the functions, powers and duties thereto assigned under this Act as are attached to analogous functions, powers and duties of the executive authority in England. Such was my opinion, when twelve years ago in the Superior Court at Montreal, I determined *Church v. Middlemiss* (1), and the appellant has failed to change my views on the question, though I admit now that in order to reach this conclusion it is not necessary to hold, as I did in that case, that Her Majesty forms part of the provincial executive authority.

GWYNNE, J. :—

I am of the opinion that the appeal in this case should be allowed, and that both of the questions submitted in it should be answered in the negative as well for the reasons given by me in the case of *The Maritime Bank v. The Queen* (2) as for other reasons. If for the reasons therein given by me the prerogative privilege insisted on does not exist in the interest of the Dominion Government, it cannot in my opinion exist for the benefit of the Governments of any of the Provinces of the Dominion. However properly by reason of the nature of the constitution given to the Dominion, debts due to the Dominion Government may be regarded as debts due to Her Majesty, I can see nothing in the constitution of the Provinces of the Dominion which makes debts due to the Provincial Governments to be, or which requires them to be regarded as being, debts due to Her Majesty, and certainly there is nothing in [699] my opinion which, assuming them to be debts due to Her Majesty, attaches to them the application of the royal prerogative of priority in payment.

There is a very distinctly marked difference between the constitution given by the British North America Act to the Dominion of Canada, and that given to the several Provinces of the Dominion. As to the constitution of the Parliament of the Dominion, the Act expressly declares that the Parliament shall consist of “the Queen, an Upper House styled the Senate, and the House of Commons,” (3) And the Executive Government and authority of and over Canada—that is the Dominion—is declared to continue and be vested in the Queen. The intent of these provisions in my opinion was, and

(1) 21 L. C. Jurist, 319.

(2) 17 Can. S. C. R. 657; *ante*,

vol. 4, p. 409.

(3) B. N. A. Act, sect. 17.



their effect also was, to constitute the Dominion of Canada an integral, and, subject only to the provisions of the British North America Act, an independent portion of the British Empire of which the Queen is the executive head, and of whose Parliament Her Majesty is an integral and independent part equally as she is, and in the same sense as she is, of the Parliament of the United Kingdom. How different are the terms of the Act which define the constitution of the Provinces of the Dominion.

In the first place, the Lieutenant-Governor of the several Provinces is no longer appointed by Her Majesty but by the Governor-General in Council, and he holds office during the pleasure of the Governor-General subject to this qualification that he shall not be removable within five years from his appointment except for cause assigned which shall be communicated to him in writing within one month after the order for his removal is made, and shall be communicated by message to the Senate and to the House of Commons [700] within one week thereafter, if the Parliament is then sitting, and if not, then within one week after the commencement of the next session of the Parliament. Secondly, the Legislatures of the Provinces are made to consist of: "The Lieutenant-Governor, and of one House styled the Legislative Assembly of Ontario" in the Province of Ontario, and in the other Provinces of "the Lieutenant-Governor, and of two Houses styled the Legislative Council and the Legislative Assembly."

To the passing of Acts by these Legislatures Her Majesty is no party nor is her name necessary to be used as assenting thereto.

While as to the Dominion of Canada the constitutional charter expressly provides that: "It shall be lawful for the Queen, by and with the advice and consent of the Senate and House of Commons, to make laws" (1), etc. The provision as to the Provinces is that: In each Province "the Legislature," that is to say, in Ontario, "The Lieutenant Governor and Legislative Assembly of Ontario" and in the other Provinces, "the Lieutenant-Governor, the Legislative Council and Legislative Assembly," "may exclusively make laws, etc."

And whereas with respect to the Dominion it is enacted that, when a Bill passed by the Houses of the Parliament is presented to the Governor-General for the Queen's assent, he shall declare either

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(1) B. N. A. Act, sect. 91.

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that he assents in the Queen's name, or that he withholds the Queen's assent, or that he reserves the Bill for the signification of the Queen's pleasure, the provision made in respect of the Provinces is that, when the Bill passed by the Houses of the Legislature of a Province is presented to the Lieutenant-Governor for the Governor-General's assent, he shall declare that he assents thereto in the Governor-General's name, or that he withholds the Governor-General's assent, or that he reserves the Bill for the signification of [701] the Governor-General's pleasure, and power is given to the Governor-General of the Dominion in Council to disallow any Act within one year after a certified copy of the Act assented to by the Lieutenant-Governor shall have been transmitted to the Governor-General by the Lieutenant-Governor, upon whom is imposed the duty of transmitting to the Dominion Government certified copies of all Bills assented to by him. It thus appears that Her Majesty's name is not necessary to be inserted in any Act of the Provincial Legislatures, nor is her assent to such Acts made necessary. True it is that the Legislature of the Province of Quebec in passing Acts makes use of the form following:—"Her Majesty, by and with the advice and consent of the Legislature of Quebec, enacts as follows." Or in other words supplying for the word "Legislature" the several parts of which by the British North America Act it is composed, the form would read thus:—Her Majesty, by and with the advice and consent of the Lieutenant-Governor, the Legislative Council and Legislative Assembly of Quebec, enacts as follows. And the Legislature of Ontario makes use of the form following:—"Her Majesty, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows." Thus omitting the "Lieutenant-Governor," who by the British North America Act is expressly declared to be a part of the "Legislature." This use of Her Majesty's name is not required by the British North America Act; as being but matter of form it may be immaterial, but it certainly is not at all necessary to the validity of the Acts of the Provincial Legislatures which would be quite valid and in perfect conformity with the British North America Act, if in all the Provinces of the Dominion, [702] whose Legislatures have two Houses, the form used should be the same as that in use in the Provinces of Nova Scotia and New Brunswick, viz. :—"Be it enacted by the Lieutenant-Governor, the Legislative Council and Assembly as follows" :—



And in those Provinces whose Legislatures consist of but one House, "be it enacted by the Lieutenant-Governor and Legislative Assembly of," or if the form following which would apply to all the Provinces should be that used :—

"The Legislature of the Province of \_\_\_\_\_, enacts, etc., etc." Then upon the Provinces is conferred the peculiarly democratic privilege, which is qualified only by the veto power vested in the Dominion Government, of amending from time to time, notwithstanding anything in the British North America Act, the constitution of the Provinces except as regards the office of Lieutenant-Governor. It cannot be contended that this royal prerogative right which is invoked, and which may be exercised always to the prejudice, and sometimes it may be to the ruin of all the private creditors of a bankrupt corporation, is a necessary incident to these Provincial Governments, for it surely cannot be argued with any show of reason that this royal prerogative is necessary to the healthy working of governments which partake so much of the democratic element as these provincial constitutions do. To my mind it seems to involve a singular inconsistency that this prerogative right which in its nature is so injurious to the public, and is asserted as an ancient common law incident to royalty, should be claimed by governments of modern creation and of so democratic a character as are the governments of the Provinces of this Dominion.

[703] The Provincial Legislatures have under the British North America Act, unquestionably in my opinion, without any consent of Her Majesty, undoubted power to make all debts due to the Provincial Governments respectively, to be due and payable to, and recoverable by and in the name of, the person for the time being filling the office of Provincial Treasurer or Attorney-General, or the Lieutenant-Governor, or any other officer of the Provincial Government; but inasmuch as Her Majesty is not by the British North America Act, as for the reasons above given, I am of opinion that she is not a party to the passing of any Act of the Provincial Legislatures constituted as they are by the British North America Act, if debts due to the several Provincial Governments should be regarded as debts due to Her Majesty, to which the royal prerogative relied upon necessarily attaches, as is contended, the effect would be that it would be impossible for the Provincial Legislatures ever to pass such an Act as I have suggested, upon the principle upon which the Province of New Brunswick now rests its claim for priority in payment of the debts due to it over all the other creditors of this insolvent bank, namely, that the rights of the Crown

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cannot be affected otherwise than by an express provision contained in an Act of Parliament to which Her Majesty is a party. If we should so hold, we should, in my opinion, without any power or authority so to do, be crippling in a very marked manner the power of the Provincial Legislatures over a matter which, in my opinion, is beyond all doubt placed under their jurisdiction and control. I can, therefore, as I have already said, see nothing in the British North America Act which requires that debts due to the several Provinces should be regarded as debts due to Her Majesty, but much which, as it appears to me, leads to the contrary conclusion, and as [704] the only object to be gained by regarding such debts to be debts due to Her Majesty would seem to be to lay a foundation for the introduction into the constitution of the Provinces of this Dominion, of a vexatious and obnoxious privilege not introduced by the terms of the British North America Act—wholly unsuited to the constitution of the Provinces—unjust to their inhabitants and repugnant to the spirit of the age, we are, in my opinion, justified in arriving at the conclusion that debts due to the several Provinces of this Dominion are not debts due to Her Majesty, and that therefore the prerogative relied upon cannot be invoked and exercised by or on behalf of the Government of any of those Provinces.

Assuming, however, debts due to the several Provincial Governments to be debts due to Her Majesty, the prerogative privilege relied upon is not, in my opinion, attached to them. It is contended by the Province of New Brunswick that the prerogative relied upon is attached to, and can be exercised by, its Government in respect of debts due it, although the prerogative privilege should not be attached to, or be exercisable in respect of, debts due to either of the Provinces of Quebec or Ontario or even in respect of debts due to the Dominion Government. This point of vantage, asserted on behalf of the Government of the Province of New Brunswick, is claimed under sect. 64 of the British North America Act, but that section has, in reality, no bearing whatever, in my opinion, upon the point under consideration.

As the old Province of Canada was by the British North America Act divided into two Provinces of the Dominion of Canada as constituted by that Act, namely, the Provinces of Quebec and Ontario; sect. 63 of the Act provides for the formation of the Executive [705] Council, that is to say of the executive authority, of those Provinces, by declaring of what officers of the Provincial Governments those councils shall be composed. The Provinces of New Brunswick and Nova Scotia, as they respectively existed prior to the passing of the British North America Act, had executive coun-

cils composed of certain officers of the governments of those respective Provinces. The limits of the Provinces of New Brunswick and Nova Scotia, as Provinces of the Dominion of Canada, as constituted by the British North America Act, were declared to be the same as the limits of the old Provinces of New Brunswick and Nova Scotia respectively had been ; it was necessary in like manner to provide for the constitution or composition of the executive authority, that is to say, of the executive councils, of those Provinces as constituted Provinces of the Dominion under the British North America Act, and for this purpose sect. 64 was inserted in the Act, the sole object and effect of which is to enact that until a different provision shall be made by the new Provinces respectively as constituted under the Act, the persons who constituted the executive councils of the old Provinces of Nova Scotia respectively, shall continue to be the executive authority of the new Provinces of New Brunswick and Nova Scotia as constituted under the Act, but subject to the provisions of the Act, thus placing the executive authority of all the Provinces upon a precisely similar footing. The section is supplemental simply to sect. 63 and not, as was contended, to sect. 65, with the subject of which sect. 64 has no relation whatever.

It is impossible to contend that by reason of anything contained in the British North America Act, the constitutions given to any one of the Provinces of Quebec, Ontario, New Brunswick or Nova Scotia, is in any respect different from that given to any of the others, or that such an incongruity exists in the Act as that one [706] of the Provinces constituted by it a Province of the Dominion of Canada can exercise a prerogative of the Crown which cannot equally be exercised by all of the Provinces of the Dominion, and as already shewn in the case of *Liquidators of the Maritime Bank v. The Queen* (1), in the claim of the Dominion Government, the prerogative relied upon does not exist in, and cannot be asserted in the interest of either of the Provinces of Quebec or Ontario, it is impossible that it can consistently be recognised as capable of being asserted in the interest of the Province of New Brunswick. Having regard to the nature of the new constitutions given by the British North America Act to the several Provinces of the Dominion, the only conclusion which, in my opinion, for the reasons I have given is warranted, is that the application of the prerogative relied upon to the case of debts due to any of the Provincial Governments is necessarily excluded.

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(1) 17 Can. S. C. R. 657 ; *ante*, vol. 4, p. 409.



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PATTERSON, J. :—

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The debt in question is for a deposit in the bank of \$35,000 of the public moneys of the Province of New Brunswick. The questions for the opinion of the Court are :—

1. “Is the Provincial Government entitled to payment in full by preference over the note holders of the said bank ?

2. “If not, is the Provincial Government entitled to payment in full over the other depositors and simple contract creditors of the bank?”

The first question is answered in the negative, contrary to the opinion of the Court below, by what I have said in the appeal of the present appellants against the Queen (1) respecting the claim made in that case on the part of the Crown for priority over the note holders.

The second question divides itself into two : First, the right of the Crown to priority ; secondly, the right of the Provincial Government to claim that priority in the name of the Crown or by virtue of the prerogative.

[707] On both of these branches of the question I agree with the Court below.

The general right of the Crown has been affirmed in this Court in *Reg. v. The Bank of Nova Scotia* (2) on grounds which, in my judgment, apply to the Provincial Governments as well as to that of the Dominion, and there is nothing in the Bank Act (3), which Act was not in question in the case referred to, or in the Winding-Up Act (4) to limit the right in respect of such assets of the bank as may remain after all outstanding notes are paid.

On the question of the right of the Provincial Government to exercise the prerogative in question, I cannot add anything by way of argument or illustration to what has been said in the Court below by the Chief Justice and by Mr. Justice Fraser.

I agree, as I have said, in the conclusion arrived at. It is, in my opinion, borne out by the cases referred to and by the spirit and tenor of the British North America Act, and is in accord with the views which prevail in the bulk of the decisions under the statute, although all the opinions expressed, particularly in the earlier cases, may not have been in harmony.

I shall not attempt to make an independent examination of the cases, and shall merely add that the same apprehension of the status

(1) 17 Can. S.C.R. 657 ; *ante*, vol. 4, p. 409.

(3) R. S. C. c. 120.

(2) 11 Can. S. C. R. 1 ; *ante*, vol. 4, p. 391.

(4) R. S. C. c. 127.



of the Provinces on which the judgment proceeds will be found evidenced in the two recent decisions of the Judicial Committee, and in the language of the judgments delivered by Lord Watson in *St. Catherine's Milling and Lumber Co. v. The Queen* (1) and *Attorney-General of British Columbia v. Attorney-General of Canada* (2), [708] not that these cases bear directly on the point in hand ; they are merely instances of late utterances where Provincial Governments are spoken of in the same terms as the Dominion Government as representing the Queen.

I have already quoted the questions proposed in the special case for the opinion of the Court.

At the argument in the Court below the case was amended by agreement by stating that the Dominion Government was a simple contract creditor of the bank. That fact does not strike me as of any importance. The circumstance that the same debtor, whether an individual or a corporation, may owe for moneys belonging to the Imperial Government and to one or more colonies or provinces, cannot possibly derogate from the rights which the Imperial Government or any one of the colonies or provinces would have if it were the sole public creditor. The very case existed in *Re Oriental Bank Corporation* (3), in which the motion was on behalf of the Treasury and on behalf of the premier and treasurer of the Colony of Victoria and the law officers for the Crown colonies of Ceylon, the Mauritius and Natal.

On the first question I am of opinion that the appeal should be allowed, although if the second had been the only question my opinion would be that it should be dismissed.

I would give no costs of appeal to either party, the liquidators of course having their costs out of the estate.

#### JUDGMENTS IN SUPREME COURT OF NEW BRUNSWICK.

[*Reported 27 New Brunswick Rep. 379.*]

ALLEN, C.J. :—

At the time the bank suspended payment the Provincial Government was a depositor to the amount of \$35,000 of the public moneys of the Province, which sum was then to the credit of the

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(1) 14 App. Cas. 46 ; *ante*, vol. 4, (2) 14 App. Cas. 295 ; *ante*, vol. 4,  
 p. 107. p. 241.

(3) 28 Ch. D. 643.

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Receiver-General ; and the Government claim that they are entitled to be paid this amount in full, in preference to any of the other creditors of the bank.

It was admitted that it was uncertain whether sufficient assets would come to the hands of the liquidators to enable them to pay the notes issued by the bank for circulation and outstanding at the time of the suspension if the claim of the Government is allowed.

The questions in dispute are : 1st. Whether since the confederation of the Provinces by the British North America Act, the Crown has any prerogative rights in the Provinces, and if it has, whether the Provincial Government can enforce them ; and 2nd. If there were any such rights, whether they have been taken away in the present case by sect. 79 of the Bank Act (1).

[392] It is not disputed that prior to confederation the prerogative rights of the Crown existed in the British colonies to the same extent as they did in England ; but the contention was that those rights were taken away by the British North America Act, 1867.

In the case of *Reg. v. Bank of Nova Scotia* (2), Ritchie, C.J., says that the Queen's prerogative in the Dominion of Canada is as exclusive as it is in England ; the Queen's rights and prerogative extending to the colonies in like manner as they do to the mother country ; and Strong, J., says that " authorities which it would be useless to quote so familiar are they establish that in a British colony governed by English law the Crown possesses the same prerogative rights as it has in England in so far as they are not abridged or impaired by local legislation." The cases of *In re Bateman's Trust* (3) ; *In re Henley & Co.* (4) ; and *In re Oriental Bank Corporation* (5), lay down the same doctrine.

Then has the British North America Act taken away, abridged or impaired that right of the Crown ? To quote again from the judgment of Strong, J., in the case of the *Bank of Nova Scotia* (2), I find the following language on that subject : " The most careful scrutiny of that statute will not, however, lead to the discovery of a single word expressly interfering with those rights, and it is a well settled axiom of statutory interpretation that the rights of the Crown cannot be altered to its prejudice by implication. . . .

(1) R. S. C. c. 120.

(2) 11 Can. S. C. R. 1 ; *ante*, vol. 4, p. 391.

(3) L. R. 15 Eq. 355.

(4) 9 Ch. D. 469.  
28 Ch. D. 643.

Putting aside this rule altogether, I deny, however, that there is anything in the Imperial legislation of 1867 warranting the least inference or argument that any rights which the Crown possessed at the date of confederation in any Province becoming a member of the Dominion were intended to be in the slightest degree affected by the statute. It is true that the prerogative rights of the Crown were by the statute apportioned between the Provinces and the Dominion, but this apportionment in no sense implies the extinguishment of any of them, and they therefore continued to subsist in their integrity, however their locality might be altered by the division of powers contained in the new constitutional law."

[393] So far from there being anything in the British North America Act abridging or impairing the prerogative rights of the Crown in the Dominion, I think the 9th sect., declaring that "The Executive Government and authority of and over Canada is hereby declared to continue and be vested in the Queen" is an implied recognition of the existence of all the prerogative rights of the Crown in the Dominion.

It was contended, however, on behalf of the liquidators of the bank that, admitting the existence of these prerogative rights, they could not be enforced by the Provincial Government because the Lieutenant-Governor of the Province was not the representative of the Sovereign since confederation, being appointed by the Governor-General and not by the Queen.

In *Mercer v. Attorney-General for Ontario* (1), where the question was whether property escheated to the Crown for want of heirs belonged to the Province of Ontario, in which the land was situate, or to the Dominion Government, the extent to which the Lieutenant-Governors of the several Provinces of the Dominion represented the Sovereign was very much considered, and the various sections of the Act bearing upon the question were all referred to by Sir William Ritchie, C.J., who said: "These various enactments and the continuance of the Executive Governments of Nova Scotia and New Brunswick very clearly shew that the Provincial Executive power and authority was to be precisely the same after as before confederation. That whatever executive powers could be exercised or administrative act done in relation to the government of the Provinces, respectively by the Lieutenant-Governor of a Province before confederation can be exercised or done by Lieutenant-Governors since confederation, subject, of course, to the provisions of the Act as is said in reference to Nova

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(1) 5 Can. S. C. R. 533; *ante*, vol. 3, p. 16.



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Scotia and New Brunswick, and is expressed in reference to Ontario and Quebec 'as far as the same are capable of being exercised after the union.' That is to say that the Executive Government of the Provinces, as exercised by the Lieutenant-Governors and Executive Councils until altered by the respective legislatures, [394] continue as before confederation, except so far as the executive powers of the Governor-General over the Dominion of Canada may interfere.

"Therefore when it is claimed that a Lieutenant-Governor and council are not competent to deal with a matter or do an executive administrative act that was within their competency before confederation, the burthen is cast on those putting forward such a claim to shew clearly from the B. N. A. Act that by express language or by necessary implication the Local Governments have been denuded of that authority, and the power has been placed in the executive authority of the Dominion. Special pains appear to me to have been taken to preserve the autonomy of the Provinces so far as it could be consistently with a federal union.

"To say, then, that the Lieutenant-Governors, because appointed by the Governor-General, do not in any sense represent the Queen in the government of their Provinces is, in my opinion, a fallacy; they represent the Queen as Lieutenant-Governors did before confederation in the performance of the executive or administrative acts now left to be performed by Lieutenant-Governors in the Provinces in the name of the Queen." And in *Reg. v. Bank of Nova Scotia* (1), the learned Chief Justice said that he adhered to all that he had said in the *Mercer Case* (2) as to the Lieutenant-Governors of Provinces representing the Crown in a limited measure.

In *Reg. v. Bank of Nova Scotia* (1), Strong, J., dealing with this subject, says: "It is therefore safe to conclude as a general proposition of law that whenever a demand may properly be sued for in the name of the Queen, the prerogative rights of the Crown attach in all portions of the British Empire subject to the prevalence of English law irrespective of the locality in which the debt arose, and of the Government in right of which it accrued."

Now, suppose that prior to confederation a sum of money belonging to the Provincial Government had been deposited in a bank, and that the bank refused to repay it to the Government, could it be disputed that the Government could sue for it in the name of the Queen? Then as by sect. 64 of the British North America

(1) 11 Can. S. C. R. 1; *ante*, vol. 4, p. 391.

(2) 5 Can. S. C. R. 538; *ante*, vol. 3, p. 16.

Act, the executive authority in the Province was continued as it [395] existed prior to the union, it seems to me that the right of the Provincial Government to take proceedings to recover the amount claimed in this case must exist as fully as it would have existed before the union, it being admitted that it is public money belonging to the Province; and I know of no way in which it could be recovered except in the name of the Queen, who would claim it by virtue of her prerogative for the benefit of the people of the Province; see per Alderson, B., in *Giles v. Grover* (1). What possible right the Dominion Government would have to take proceedings to recover money belonging to the Government of this Province I cannot see. Under any circumstances the proceedings would necessarily be in the name of the Queen, and therefore according to the judgment of Mr. Justice Strong, the prerogative right attached to it in this Province where the debt arose, and where the rights of the Government accrued, and where consequently, as said by the Chief Justice in *Mercer v. Attorney-General for Ontario* (2), the Lieutenant-Governor would represent the Queen.

I have not thought it necessary to consider particularly the several sections of the British North America Act bearing on the question. They have been fully considered in the *Mercer Case* (2), and also in the judgment of my brother Fraser in this case.

I think the first question should be decided against the liquidators, and this necessarily disposes of the second question, which depends on the existence of the prerogative right of the Crown in the Province. If that right does exist the Crown's right must prevail over the rights of a subject in respect to the payment of debts of equal degree; *Reg. v. Bank of Nova Scotia* (3).

We have already decided in the case of *Reg. v. Liquidators of the Maritime Bank* (4), that the Crown was not bound by sect. 79 of the Bank Act.

I think the Government is entitled to judgment on both the questions raised.

WETMORE, J. :—

I agree with the learned Chief Justice.

[396] FRASER, J. :—

The questions submitted for the opinion of the Court under the special case in this matter are : 1st. Is the Provincial Government, which was at the time of the stoppage of the bank a depositor

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(1) 9 Bing. 156.

(2) 5 Can. S. C. R. 538; *ante*, vol.

3, p. 16.

(3) 11 Can. S. C. R. 1; *ante*, vol.  
4, p. 391.

(4) 27 N. B. Rep. 357.

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therein of the public moneys of the Province to the amount of \$35,000, entitled to payment in full in preference over the note holders of the bank? and, 2nd. If not, is the Provincial Government entitled to payment in full over the other depositors and simple contract creditors of the bank?

It was claimed by the Attorney-General on the part of the Government that the public moneys of the Province were Crown moneys, in respect to which the prerogative privilege appertaining to the Crown applied so as to entitle the Provincial Government to payment in full of such moneys in preference to the note holders and other depositors and simple contract creditors of the bank.

*Reg. v. Bank of Nova Scotia* (1), decides that this prerogative privilege belongs to the Crown in regard to debts due Her Majesty in the Dominion of Canada in relation to the Government of Canada. Does it then belong to the Provincial Executive in regard to a debt due to the Government of the Province?

It would seem to me that while the Dominion Executive act for the Crown in federal matters, the Provincial Executive no less act for the Crown in matters of provincial concern.

In the British North America Act, sub-division viii., "Revenues; Debts; Assets; Taxation;" will be found various sections setting forth what property, revenues, etc., shall belong to each Province. This sub-division refers to the Consolidated Revenue Fund of Canada (clearly Crown moneys), and sect. 118 directs that certain sums shall be paid out of this fund by Canada to the several Provinces for the support of the Governments and Legislatures. Sect. 119 refers to a special sum to be paid by Canada to New Brunswick for a limited period.

Sect. 126 enacts that "such portions of the duties and revenues over which the respective Legislatures of Canada, Nova Scotia and [397] New Brunswick had before the union power of appropriation as are by this Act reserved to the respective Governments or Legislatures of the Provinces, and all duties and revenues raised by them in accordance with the special powers conferred upon them by this Act shall in each Province form one Consolidated Revenue Fund, to be appropriated for the public service of the Province."

The moneys which were deposited by the Provincial Government in the Maritime Bank were the public moneys of the Province, and were deposited to the credit of the Receiver-General of the Province.



By sect. 1 of cap. 9 of the Consolidated Statutes, it is enacted that the Provincial Secretary of the Province shall, by virtue of his office, be Receiver-General, and shall give a bond to the Queen, with sureties conditioned for the faithful discharge of the duties of his office of Receiver-General.

By sect. 2, all public moneys, from whatever source derived, belonging to the Province are to be paid to the Receiver-General, or into such bank or banks in the Province to the credit of the Receiver-General as the Governor in Council might from time to time direct; and when paid to the Receiver-General he is to deposit it in the bank to his credit as Receiver-General.

Several of the sections in this chapter, notably the 21st and 23rd, refer to persons receiving public moneys for the Crown, and public moneys for which any corporation, officer or person is accountable to the Crown.

At the union the Province of Canada was divided into two Provinces, viz., the Provinces of Ontario and Quebec. Upon this division it became necessary to make various provisions in respect to those new Provinces, some of which may be stated :

1st. As to the composition in the first instance of the Executive Council in each of these Provinces. (B. N. A. Act, sect. 63.)

2nd. As to the vesting in and the division between those Provinces of all powers, authorities and functions vested in or exercisable by the Governors or Governors in Council, so far as the same after the union were capable of being exercised in relation to the Governments of Ontario and Quebec. (Sect. 65.)

[398] 3rd. As to the creation of the Legislature of Ontario : (Sects. 69 and 70.)

4th. As to the creation of the Legislature of Quebec (sect. 71 and following sections). Sect. 72, referring to the appointment of the Legislative Council of Quebec, states that it shall be composed of twenty-four members, to be appointed by the Lieutenant-Governor in the Queen's name, by instrument under the Great Seal of Quebec.

5th. Vacancies in the Legislative Council of Quebec to be filled by appointments to be made by the Lieutenant-Governor in the Queen's name, by instrument under the Great Seal. (Sect. 75.)

6th. The Lieutenant-Governors of Ontario and Quebec shall from time to time in the Queen's name, by instrument under the Great Seal of the Province, summon and call together the Legislative Assembly of the Province.

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These sections set forth many acts of Provincial government which are to be done in the Queen's name and under the Great Seal of each of the Provinces of Ontario and Quebec.

In Bouvier's Dictionary, page 722, in giving the definition of the words "Great Seal," it is said: "It is a seal by virtue of which a great part of the royal authority is exercised."

After confederation, Her Majesty by royal warrant directed the use in New Brunswick of a new Great Seal, and the proclamation in reference to such seal is to be found in the Royal Gazette of date 29th December, 1869, and is as follows:

.....  
" [L.S.]  
: L. A. Wilmot. :  
.....

By the Honourable Lemuel Allen Wilmot,  
D.C.L., Lieutenant-Governor of the Province  
of New Brunswick, etc.

"A Proclamation.

"Whereas Her Most Gracious Majesty, by her Royal Warrant under her sign manual, dated the seventh day of May now last past, and transmitted by the Right Honourable the Secretary of State for the Colonies, did authorize and direct that a certain seal prepared by the order of Her Majesty, and which accompanied the said warrant, should be used for the sealing of all things which pass the Great Seal of this Province, and for Her Majesty's service in this Province.

[399] "I do therefore hereby proclaim and declare that the said seal shall be henceforth used in this Province for the sealing of all things whatsoever which shall pass the Great Seal of this Province, on, from and after the first day of January next.

"Given under my hand and seal at Fredericton, the 28th day of December, A.D. 1869, and in the thirty-third year of Her Majesty's reign.

"By command of the Lieutenant-Governor.

"JOHN A. BECKWITH."

The delivery of this Great Seal into the hands of the Lieutenant-Governor to be used for the sealing of all things whatsoever which pass the Great Seal of the Province and for Her Majesty's service in this Province, clearly shews that all public acts of state which are necessary in the administration of the affairs of the Province, and done by the Lieutenant-Governor or by the Lieutenant-Governor by and with the advice of his Executive Council, are done by virtue of the royal authority, and the exercise of the royal prerogative where such acts, if they had been done before confederation, would be claimed to be done in the exercise of the royal prerogative.



I have referred to the above sections of the British North America Act and to the use of the Great Seal because it was urged at the argument by one of the counsel for the liquidators that since the union the Lieutenant-Governor of any of the Provinces in no wise represented the Queen or acted in her name, but was merely an officer of the Dominion Government, and therefore could not exercise any of Her Majesty's prerogatives.

Several of the sections I have referred to authorize acts of state in Ontario and Quebec to be done by the Lieutenant-Governor in the Queen's name by instrument under the Great Seal of the Province, and these acts are such as are recognised as being done in the exercise of the prerogative.

I have said acts of state in Ontario and Quebec, but like acts are done in Nova Scotia and New Brunswick, such as the summoning, prorogation and dissolution of the Legislatures of those Provinces and the appointment of members of the Legislative Councils in those Provinces; and yet there are no sections which [400] state in words that such acts are to be done in Nova Scotia and New Brunswick in the Queen's name.

This power, in the case of Nova Scotia and New Brunswick, is clearly given by sect. 64 of the British North America Act, which enacted that "the constitution of the Executive Authority in each of the Provinces of Nova Scotia and New Brunswick shall, subject to the provisions of this Act, continue as it exists at the union until altered under the authority of this Act."

The constitution of the Executive was to continue except as altered, and by the constitution I understand not only the composition but the powers of the Executive. So far as the composition of the Executive is concerned, the only alteration made was in the substitution of a Lieutenant-Governor—appointed by the Governor-General in Council by instrument under the Great Seal of Canada (sect. 58)—for a Lieutenant-Governor appointed by Her Majesty; while, in regard to the powers of the Executive, great and extensive changes were made, but in the changes that were made I cannot see anything in the British North America Act which takes away or abridges the Executive authority (by that I mean the Provincial Executive authority) in respect to all subjects and matters which by the Act are declared to be Provincial, and which are left to be dealt with by the Provincial Executive and Provincial Legislatures.

It is under the powers which are left in the Provincial Executive by sect. 64 that the authority is obtained for the summoning and calling together, prorogation and dissolution of the Assembly in

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Nova Scotia and New Brunswick as well as the exercising of any other royal prerogative which is necessary in the carrying on of the affairs of the Province since the union.

The British North America Act never contemplated that the summoning and calling together of the Legislature in each of the Provinces originally constituting the Dominion should be in Ontario in the Queen's name (sect. 82) and in Nova Scotia and New Brunswick in the name of one not acting in the Queen's name. The reasonable conclusion is that Parliament intended that under sect. 64 [401] this prerogative should remain in the Provincial Executives of Nova Scotia and New Brunswick, and therefore under that section that the summoning and calling together of the Legislature in each of the Provinces of Nova Scotia and New Brunswick would be in the Queen's name by instrument under the Great Seal of the Province.

In *Lenoir v. Ritchie* (1) Gwynne, J., appeared to be of the opinion that the use of Her Majesty's name by the provincial authorities was confined to the summoning and calling together of the Legislature and added: "Singular as it seems this is by the 82nd section rather by accident I apprehend than design confined to the Lieutenant-Governors of Ontario and Quebec."

As regards this latter observation it would not, I think, have been made had the attention of that learned Judge been directed to sect. 64, and had the fact been presented to him that the provisions of sect. 82 were required in the case of the Provinces of Ontario and Quebec, they being made new Provinces so to speak by the British North America Act but not so required as regards the old Provinces of Nova Scotia and New Brunswick, the 64th section making full provision for those Provinces in that respect; and in regard to the use of Her Majesty's name by the provincial authorities in other cases than the summoning and calling together of the Legislatures I have already referred to sects. 72 and 75 of the British North America Act.

In my opinion sect. 64 left the constitution of the executive authority in Nova Scotia and New Brunswick the same as it existed before the union subject to the provisions of the British North America Act that is without any of its powers in respect to all subjects and matters which by the Act are declared to be Provincial being taken away or abridged and the Lieutenant-Governor by the possession of the Great Seal of the Province and under sect. 64 is vested with the right to exercise the royal prerogative in all such subject matters.

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(1) 3 Can. S. C. R. 575; *ante*, vol. 1, p. 488.

Then again we find by sect. 12 that the powers, authorities and functions vested in or exercisable by the Lieutenant-Governors of [402] the Provinces, either individually or with the advice and consent of their respective Executive Councils, are to be vested in and exercisable by the Governor-General individually or with the advice and consent of the Privy Council of Canada, but only so far as they continue in existence and are capable of being exercised after the union in relation to the government of Canada leaving all such powers, authorities and functions so far as they remain in existence and are capable of being exercised in relation to the government of the Provinces still vested in the Lieutenant-Governors of those Provinces to be exercised by such Lieutenant-Governors individually, or by and with the advice of their respective Executive Councils as the case may be.

It was urged by counsel for the liquidators that since the union the Lieutenant-Governor of a Province in no wise represented the Queen but was merely an officer of the Dominion Government and could not exercise any of the prerogatives of the Crown, and therefore that there could not be any prerogative privilege in respect to debts due to the Government of any Province; and one of the counsel for the liquidators went so far as to urge that the prerogative right of the Crown to priority in payment of debts due to it existed in Canada only on behalf of the Government of the Dominion and could not be exercised in respect to debts due to the Imperial Government.

I have written my views on this point at some length, but it would have been sufficient if I had simply referred on this point to the judgment of Ritchie, C.J., in the case of *Mercer v. Attorney-General for Ontario* (1) which deals so exhaustively with the status and powers of Lieutenant-Governors since the union and sets forth how far they represent the Queen in the performance of all executive and administrative acts now left to be performed by the Lieutenant Governors in the Provinces in the name of the Queen.

The moneys which were deposited with the Maritime Bank were the public moneys and public revenues of the Province and as was pertinently observed by the Attorney-General at the argument, if they do not belong to the Crown to whom do they belong?

[403] No answer or even suggestion was made to shew that the right to enforce the payment of such moneys was or could be in the name of any other than the Queen.

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I think Strong, J., has in the case of *Reg. v. Bank of Nova Scotia* (1), already referred to, fully dealt with the whole subject, although the question for decision in that case was as to the right of priority of the Crown as representing the Dominion of Canada.

I quote from page 19 in which he says:—"I deny, however, that there is anything in the Imperial legislation of 1867 warranting the least inference or argument that any rights which the Crown possessed at the date of confederation in any Province becoming a member of the Dominion were intended to be in the slightest degree affected by the Statute; it is true that the prerogative rights of the Crown were by the Statute apportioned between the Provinces and the Dominion, but this apportionment in no sense implies the extinguishment of any of them and they therefore continue to subsist in their integrity however their locality might be altered by the division of powers contained in the new constitutional law. It follows, therefore, that the Crown, speaking generally, still retains this right to payment in priority to other creditors of equal degree in Prince Edward Island.

"It is said, however, that while the last proposition may be true as regards the rights of the Crown as representing the Provincial Government of the island it does not apply to the Crown as representing as in the present case it does the Government of the Dominion. This objection is concluded by authority still more decisive than the former. That the Crown is at the head of the Government of the Dominion, by which I mean that Her Majesty the Queen is in her own royal person the head of that Government and not her viceroy the Governor-General there can be no doubt or question, for it is in so many words declared by sect. 9 of the British North America Act which enacts:—"The Executive Government and authority of and over Canada is hereby declared to continue and be vested in the Queen."

"That for the purpose of entitling itself to the benefit of its prerogative rights the Crown is to be considered as one and indivisible throughout the Empire and is not to be considered as a quasi corporate head of several distinct bodies politic (thus distinguishing the rights and privileges of the Crown as the head of the Government of the United Kingdom from those of the Crown as head of the Government of the Dominion, and again distinguishing it in its relations to the Dominion and to the several Provinces of the Dominion), is a point so settled by authority as to be beyond controversy."



All this makes it abundantly clear, I think, that a debt due to a Provincial Government within the Dominion in respect of the public moneys of the Province is a debt due to the Crown as representing the Provincial Government, and that for its enforcement all the prerogative rights of the Crown are available.

If I be correct in this opinion then the debt due by the Maritime Bank to the Provincial Government is a debt due to the Crown and as such is entitled to payment in full by preference over the note holders and other simple contract creditors of the bank ; because the Crown is not bound either by the Winding up Act or by the Bank Act, sect. 79, of which was relied upon as giving the note holders a priority in payment :—"The payment of the notes issued by the bank and intended for circulation then outstanding shall be the first charge upon the assets of the bank in case of its insolvency." See *Reg. v. Bank of Nova Scotia* (1) and *Reg. v. Liquidators of the Maritime Bank* (2) decided by this Court at the last term and now up on appeal to the Supreme Court of Canada (3).

It was agreed at the argument that the Special Case should be amended by stating that the Dominion Government was a simple contract creditor of the bank.

From this the only point made was that the Crown in the Dominion represented the Dominion Government alone and not the Imperial Government or the Government of any of the Provinces in the exercise of any prerogative right of priority in payment of a Crown debt.

Ritchie, C.J., in *Reg. v. Bank of Nova Scotia* (1) did not discover anything in the British North America Act taking away from Her [405] Majesty the prerogative right in regard to debts due Her Majesty in the Dominion of Canada of an Imperial character. The judgment in that case determined that the prerogative right in regard to debts due the Government of the Dominion existed and I think that such prerogative right in regard to debts due the Government of the Province belongs to the Crown as representing such Government ; and for these reasons I am of opinion that both of the questions submitted for the opinion of the Court should be answered in the affirmative.

KING, J., agreed with Mr. Justice Fraser.

PALMER and TUCK, JJ., took no part in the case.

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(1) 11 Can. S. C. R. 1 ; *ante*, vol. 4, p. 391.

(3) 17 Can. S.C.R. 657 ; *ante*, vol. 4, p. 409.

(2) 27 N. B. Rep. 357.

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AND

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BARRETT ..... *Respondent*.

*On appeal from the Supreme Court of Canada,*

CITY OF WINNIPEG ..... *Appellant*;

AND

LOGAN ..... *Respondent*.

*On appeal from the Court of Queen's Bench for Manitoba.*

[*Reported [1892] A. C. 445*].

*Dominion Statute, 33 Vict. c. 3—Manitoba Public Schools Act, 1890*  
*—Denominational Schools—Powers of Provincial Legislature.*

According to the true construction of the Constitutional Act of Manitoba, 1870, 33 Vict. c. 3 (Dominion Statute), having regard to the state of things which existed in Manitoba at the date thereof, the Legislature of that Province did not exceed its powers in passing the Public Schools Act, 1890.

Sect. 22 of the Act of 1870 authorizes the Provincial Legislature exclusively to make laws in relation to education so as not to “prejudicially affect any right or privilege with respect to denominational schools which any class of persons have, by law or practice in the Province, at the union” :—

*Held*, that the Act of 1890, which abolished the denominational system of public education established by law since the union, but which did not compel the attendance of any child at a public school or confer any advantage in respect of attendance other than that of free education, and at the same time left each denomination free to establish, maintain and conduct its own schools, did not contravene the above proviso; and that accordingly certain by-laws of a municipal corporation which authorized assessments under the Act were valid.

Appeal in the first case from a judgment of the Supreme Court (Oct. 28, 1891), (1) reversing one of the Court of Queen's Bench for Manitoba (Feb. 2, 1891), (2);

\**Present* :—LORD WATSON, LORD MACNAGHTEN, LORD MORRIS, LORD HANNEN, SIR RICHARD COUCH, and LORD SHAND.

(1) 19 Can. S. C. R. 374; *post*, p. 49. (2) 7 Man. 273; *post*, p. 81.

[446] in the second case from a judgment of the Court of Queen's Bench (Dec. 19, 1891), which followed that of the Supreme Court.

The Province of Manitoba joined the union in 1870, upon the terms of the Constitutional Act of Manitoba, 1870, 33 Vict. c. 3 (Dominion Statute). Sect. 22 is the material section and is set out in their Lordships' judgment. In 1890 the Provincial Legislature passed two statutes relating to education—chaps. 37 and 38—the latter of which is intituled "The Public Schools Act, 1890." Its validity was the subject of this appeal.

The facts are stated in the judgment of their Lordships.

In the first case the application was for a summons to shew cause why the by-laws in question, which were passed under the Act for levying a rate for school and municipal purposes in the city of Winnipeg, should not be quashed for illegality on the ground that the amounts levied for Protestant and Roman Catholic Schools were therein united, and that one rate was levied upon Protestants and Catholics alike for the whole sum, in a manner which but for the Act of 1890 would have been invalid, according to the Education Acts thereby repealed.

Killam, J., dismissed the summons, holding that the rights and privileges referred to in the Dominion Statute were those of maintaining denominational schools, of having children educated in them, and of having inculcated in them the peculiar doctrine of the respective denominations. He regarded the prejudice effected by the imposition of a tax upon Catholics for schools to which they were conscientiously opposed as something so indirect and remote that it was not within the Act.

The Court of Queen's Bench affirmed this order. Taylor, C.J., and Bain, J., held that "rights and privileges" included moral rights, and that whatever any class, of

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persons was in the habit of doing in reference to denominational schools should continue, and not be prejudicially affected by provincial legislation, but that none of those rights and privileges had been in any way affected by the Act of 1890. Dubuc, J., dissented, holding that the right or privilege existing at the union was the right of each denomination to have its denominational school, with such teaching as it might think fit, and the privilege of not being compelled to contribute to other schools of [447] which members of such denomination could not in conscience avail themselves; and that the Act of 1891 invaded such privilege, and was consequently ultra vires.

The Supreme Court reversed the order.

Ritchie, C.J., held that as Catholics could not conscientiously continue to avail themselves of the public schools as carried on under the system established by the Public Schools Act, 1890, the effect of that Act was to deprive them of any further beneficial use of the system of voluntary Catholic schools which had been established before the union, and had thereafter been carried on under the State system introduced in 1871. Patterson, J., pointed out that the words "injuriously affect" in sect. 22, subsect. 1, of the Manitoba Constitutional Act, would include any degree of interference with the rights or privileges in question, although falling short of the extinction of such rights or privileges. He held that the impediment cast in the way of obtaining contributions to voluntary Catholic denominational schools by reason of the fact that all Catholics would under the Act be compulsorily assessed to another system of education amounted to an injurious affecting of their rights and privileges within the meaning of the sub-section. Fournier, J., pointed out that the mere right of maintaining voluntary schools if

they chose to pay for them, and of causing their children to attend such schools, could not have been the right which it was intended to reserve to Catholics or other classes of persons by the use of the word "practice," since such right was undoubtedly one enjoyed by every person or class of persons by laws, and took a similar view to that taken by Patterson, J. Taschereau, J., gave judgment in the same sense, holding that the contention of the appellants gave no effect to the word "practice" inserted in the section.

In the second case a similar application was made by the respondent Logan, and allowed in consequence of the Supreme Court's decision in Barrett's case.

Sir *H. Davey*, Q.C., *McCarthy*, Q.C., and *Campbell* (both of the Canadian bar), for the appellant, contended that the view taken by Killam, J., Taylor, C.J., and Bain, [448] J., was correct. The Act of 1890 did not affect any right or privilege with respect to denominational schools which the respondent or any class of persons had by law or practice in the Province prior to the union. It established one system of public schools throughout the Province, and abolished all the laws regarding public schools which had theretofore been passed and were then existing. Sects. 21 and 22, sub-sects. 1, 2 and 3, of the Manitoba Act, 1870, were referred to, and the various affidavits which had been made in the case, and it was contended that the Act of 1890 was not ultra vires. It enacted that all public schools in the Province are to be free schools (sect. 5); that all religious exercises therein shall be conducted according to the regulation of the advisory board which is provided by sect. 6; but in case the guardian or parent of any pupil notifies the teacher that he does not wish such pupil to attend such religious

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exercises, then the pupil need not attend. All public schools are non-sectarian, and no religious exercises are allowed, except as provided by the Act, which, moreover, is not compulsory.

With regard to the state of things, "law or practice" in Manitoba prior to the union, the law then in force was the law of England, as it existed at the date of the Hudson's Bay Company's charter, viz., the 2nd of May, 1670, in so far as applicable. Accordingly the respondent had not, nor had the Roman Catholics of the Province, any right or privilege by law in relation to the Roman Catholic denominational schools. The only right and privilege on this subject which they possessed was, as shewn by the affidavits, the privilege to establish and maintain private schools which were supported by fees paid by the parents or guardians of the children who attended them, supplemented, it may be, by those who belonged to the Roman Catholic Church. The Act of 1890 does not interfere with or prejudicially affect this right; for the respondent and Roman Catholics are still entitled to establish and maintain denominational schools as before the union. Consequently it has not been shewn that the Act interferes with any rights and privileges which were locally enjoyed within the city.

Reference was made to *Ex parte Renaud* (1); *Fearon* [449] v. *Mitchell* (2). In the other appeal the respondent Logan represented members of the Church of England, whose rights and privileges were similar to those of Barrett and his co-religionists.

Sir *Richard Webster*, A.G., *Blake*, Q.C., and *Ewart*, Q.C. (both of the Canadian bar), and *Gore*, for the respondent, Barrett :—

(1) 1 Pugsley 273; *ante*, vol. 2, p. 445.

(2) L. R. 7 Q. B. 690.



The Act of 1890 prejudicially affects the rights and privileges of Roman Catholics in the Province, as they existed by law or practice at the date of the union, with respect to denominational schools. By its operation they are deprived of the system of Roman Catholic denominational schools as they existed before the union. The public schools constituted by the Act are, or may be, Protestant denominational schools, and Catholic ratepayers are compelled to contribute thereto. They cannot conscientiously permit their children to attend the schools established by the Act, and, having regard to the compulsory rate levied upon them in support thereof, material impediments are cast in the way both of subscribing and of obtaining subscriptions in support of Catholic denominational schools, and of setting up and maintaining the same. The rights and privileges of Catholics are, accordingly, prejudicially affected. At the date of the union there was not, and there never had been, any State system of education in Manitoba, nor was there any compulsory rate or State grant for purposes of education. There was, however, an established and recognised system of voluntary denominational education, including Roman Catholic schools supported in part by voluntary contributions from Catholics and contributed by the Roman Church. In a similar way, the Church of England and various Protestant sects supported their own schools. The Provincial Legislature established by the Dominion Statute of 1870, passed 34 Vict. c. 12, establishing a State system of education in the Province. Subsequent Acts were passed, and the whole were codified by 44 Vict. c. 4; and modification was made therein by 45 Vict. cc. 8 and 11; 46 & 47 Vict. c. 46; 47 Vict. cc. 37 and 54; 48 Vict. c. 27; 50 Vict. cc. 18 and 19; 51 Vict. c. 31; 52 Vict. cc. 5 and 21; all which Acts shew that useful

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education can be provided without disturbing rights and [450] privileges as they existed in 1870. Then came the Act complained of. Besides the establishment of public schools, controlled as to religious teaching by an advisory board, sect. 179 abolished pre-existing Catholic school districts, and provided that all the assets of such Catholic schools should belong to, and all the liabilities thereof should be paid by, the public school districts established by the new Act. The right and privilege which had been prejudicially affected was the right to have a religious education conducted under the supervision of their Church, administered in the schools which they were compelled to support; to have the immunity existing in 1870, from being compelled to support schools to which they objected. Their interests were prejudiced in being compelled by the Act to support one set of schools while, as a matter of religion and conscience, they would, at the same time, have to establish another set of schools to which alone they could send their children. The new public schools, controlled ultimately by a majority of ratepayers, would be conducted for the benefit of Protestant and Presbyterian denominations and Catholics would thereby be prejudiced and injured. It was contended that *Fearon v. Mitchell* (1) had no bearing on the case. See *Musgrave v. Inclosure Commissioners* (2), and *Barlow v. Ross* (3), where the existence of rights and privileges is discussed. In *Ex parte Renaud* (4) the head note is wrong. It was not decided that no legal privilege existed in that case, but merely that it had not been infringed.

*A. J. Ram*, for the respondent Logan.

*McCarthy*, Q.C., replied.

(1) L. R. 7 Q. B. 690.

(2) L. R. 9 Q. B. 162.

(3) 24 Q. B. D. 381.

(4) 1 Pugsley 273; *ante*, vol., 2, p. 445.

The judgment of their Lordships was delivered by—

LORD MACNAGHTEN:—

These two appeals were heard together. In the one case the city of Winnipeg appeals from a judgment of the Supreme Court of Canada, reversing a judgment of the Court of Queen's Bench for Manitoba; in the [451] other from a subsequent judgment of the Court of Queen's Bench for Manitoba, following the judgment of the Supreme Court. The judgments under appeal quashed certain by-laws of the city of Winnipeg, which authorized assessments for school purposes in pursuance of the Public Schools Act, 1890, a statute of Manitoba to which Roman Catholics and members of the Church of England alike take exception. The views of the Roman Catholic Church were maintained by Mr. Barrett; the case of the Church of England was put forward by Mr. Logan. Mr. Logan was content to rely on the arguments advanced on behalf of Mr. Barrett; while Mr. Barrett's advisers were not prepared to make common cause with Mr. Logan, and naturally would have been better pleased to stand alone.

The controversy which has given rise to the present litigation is no doubt beset with difficulties. The result of the controversy is of serious moment to the Province of Manitoba and a matter apparently of deep interest throughout the Dominion. But in its legal aspect the question lies in a very narrow compass. The duty of this Board is simply to determine as a matter of law whether, according to the true construction of the Manitoba Act, 1870, having regard to the state of things which existed in Manitoba at the time of the union, the Provincial Legislature has or has not exceeded its powers in passing the Public Schools Act, 1890.

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Manitoba became one of the Provinces of the Dominion of Canada under the Manitoba Act, 1870, which was afterwards confirmed by an Imperial Statute known as the British North America Act, 1871. Before the union it was not an independent Province, with a constitution and a legislature of its own. It formed part of the vast territories which belonged to the Hudson's Bay Company and were administered by their officers or agents.

The Manitoba Act, 1870, declared that the provisions of the British North America Act, 1867, with certain exceptions not material to the present question, should be applicable to the Province of Manitoba, as if Manitoba had been one of the Provinces originally united by the Act. It established a legislature for Manitoba, consisting [452] of a legislative council and a legislative assembly, and proceeded, in sect. 22, to re-enact with some modifications the provisions with regard to education, which are to be found in sect. 93 of the British North America Act, 1867. Sect. 22 of the Manitoba Act, so far as it is material, is in the following terms:—

“In and for the Province the said Legislature may exclusively make laws in relation to education, subject and according to the following provisions:—

“(1) Nothing in any such law shall prejudicially affect any right or privilege with respect to denominational schools which any class of persons have by law or practice in the Province at the union.”

Then follow two other sub-sections. Sub-sect. 2 gives an “appeal,” as it is termed in the Act, to the Governor-General in Council from any act or decision of the Legislature of the Province or of any Provincial authority “affecting any right or privilege of the Protestant or Roman Catholic minority of the Queen's subjects in relation to education.” Sub-sect 3 reserves certain

limited powers to the Dominion Parliament in the event of the Provincial Legislature failing to comply with the requirements of the section or the decision of the Governor-General in Council.

At the commencement of the argument a doubt was suggested as to the competency of the present appeal in consequence of the so-called appeal to the Governor-General in Council provided by the Act. But their Lordships are satisfied that the provisions of sub-sects. 2 and 3 do not operate to withdraw such a question as that involved in the present case from the jurisdiction of the ordinary tribunals of the country.

Sub-sects. 1, 2 and 3 of sect. 22 of the Manitoba Act, 1870, differ but slightly from the corresponding sub-sects. of sect. 93 of the British North America Act, 1867. The only important difference is that in the Manitoba Act, in sub-sect. 1, the words "by law" are followed by the words "or practice," which do not occur in the corresponding passage in the British North America Act, 1867. These words were no doubt introduced to meet the special case of a country which had not as yet enjoyed the security of laws properly so called. It is not, perhaps, very easy to define precisely the meaning of such an expression as "having a right or privilege by practice." But the object of the enactment is tolerably clear. Evidently the word "practice" is not to be construed as equivalent to "custom having the force of law." Their Lordships are convinced that it must have been the intention of the Legislature to preserve every legal right or privilege and every benefit or advantage in the nature of a right or privilege, with respect to denominational schools which any class of persons practically enjoyed at the time of the union.

What, then, was the state of things when Manitoba was admitted to the union? On this point there is no dispute. It is agreed that there was no law or regulation

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or ordinance with respect to education in force at the time. There were, therefore, no rights or privileges with respect to denominational schools existing by law. The practice which prevailed in Manitoba before the union is also a matter on which all parties are agreed. The statement on the subject by Archbishop Taché, the Roman Catholic Archbishop of St. Boniface, who has given evidence in Barrett's case, has been accepted as accurate and complete.

"There existed," he says, "in the territory now constituting the Province of Manitoba a number of effective schools for children.

"These schools were denominational schools, some of them being regulated and controlled by the Roman Catholic Church, and others by various Protestant denominations.

"The means necessary for the support of Roman Catholic schools were supplied, to some extent, by school fees, paid by some of the parents of the children who attended the schools, and the rest were paid out of the funds of the Church contributed by its members.

"During the period referred to Roman Catholics had no interest in or control over the schools of the Protestant denominations, and the members of the Protestant denominations had no interest in or control over the schools of the Roman Catholics. There were no public schools in the sense of State schools. The members of the Roman [454] Catholic Church supported the schools of their own Church for the benefit of Roman Catholic children and were not under obligation to, and did not contribute to, the support of any other schools."

Now, if the state of things which the archbishop describes as existing before the union had been a system established by law, what would have been the rights and privileges of the Roman Catholics with respect to denominational schools? They would have had by law the



right to establish schools at their own expense, to maintain their schools by school fees or voluntary contributions, and to conduct them in accordance with their own religious tenets. Every other religious body which was engaged in a similar work at the time of the union would have had precisely the same right with respect to their denominational schools. Possibly this right, if it had been defined or recognised by positive enactment, might have had attached to it, as a necessary or appropriate incident, the right of exemption from any contribution under any circumstances to schools of a different denomination. But, in their Lordships' opinion, it would be going much too far to hold that the establishment of a national system of education upon an unsectarian basis is so inconsistent with the right to set up and maintain denominational schools that the two things cannot exist together, or that the existence of the one necessarily implies or involves immunity from taxation for the purpose of the other. It has been objected that if the rights of Roman Catholics and of other religious bodies, in respect of their denominational schools, are to be so strictly measured and limited by the practice which actually prevailed at the time of the union, they will be reduced to the condition of a "natural right" which "does not want any legislation to protect it." Such a right, it was said, cannot be called a privilege in any proper sense of the word. If that be so, the only result is that the protection which the Act purports to extend to rights and privileges existing "by practice" has no more operation than the protection which it purports to afford to rights and privileges existing "by law." It can hardly be contended that, in order to give a substantial operation and effect to a saving clause expressed in general terms, it is incumbent upon the Court to discover privileges which are not [455] apparent of themselves, or to ascribe distinctive

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and peculiar features to rights which seem to be of such a common type as not to deserve special notice or require special protection.

Manitoba having been constituted a Province of the Dominion in 1870, the Provincial Legislature lost no time in dealing with the question of education. In 1871 a law was passed which established a system of denominational education in the common schools, as they were then called. A board of education was formed, which was to be divided into two sections, Protestant and Roman Catholic. Each section was to have under its control and management the discipline of the schools of the section. Under the Manitoba Act the Province had been divided into twenty-four electoral divisions, for the purpose of electing members to serve in the Legislative Assembly. By the Act of 1871 each electoral division was constituted a school district, in the first instance. Twelve electoral divisions, "comprising mainly a Protestant population," were to be considered Protestant school districts; twelve, "comprising mainly a Roman Catholic population," were to be considered Roman Catholic school districts. Without the special sanction of the section there was not to be more than one school in any school district. The male inhabitants of each school district, assembled at an annual meeting, were to decide in what manner they should raise their contributions towards the support of the school, in addition to what was derived from public funds. It is, perhaps, not out of place to observe that one of the modes prescribed was "assessment on the property of the school district," which must have involved, in some cases at any rate, an assessment on Roman Catholics for the support of a Protestant school, and an assessment on Protestants for the support of a Roman Catholic school. In the event of an assessment there was no provision for exemption, except in the case of the father or guardian of a school child, a Protestant



in a Roman Catholic school district or a Roman Catholic in a Protestant school district—who might escape by sending the child to the school of the nearest district of the other section and contributing to it an amount equal to what he would have paid if he had belonged to that district.

The laws relating to education were modified from [456] time to time, but the system of denominational education was maintained in full vigour until 1890. An Act passed in 1881, following an Act of 1875, provided among other things that the establishment of a school district of one denomination should not prevent the establishment of a school district of the other denomination in the same place, and that a Protestant and a Roman Catholic district might include the same territory in whole or in part. From the year 1876 until 1890 enactments were in force declaring that in no case should a Protestant ratepayer be obliged to pay for a Roman Catholic school or a Roman Catholic ratepayer for a Protestant school.

In 1890 the policy of the last nineteen years was reversed; the denominational system of public education was entirely swept away. Two Acts in relation to education were passed. The first (53 Vict. c. 37) established a Department of Education and a board consisting of seven members, known as the "Advisory Board." Four members of the board were to be appointed by the Department of Education, two were to be elected by the public and high school teachers, and the seventh member was to be appointed by the University Council. One of the powers of the advisory board was to prescribe the forms of religious exercises to be used in the schools.

The Public Schools Act, 1890 (53 Vict. c. 38), enacted that all Protestant and Roman Catholic school districts should be subject to the provisions of the Act, and that all public schools should be free schools. The provisions

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of the Act with regard to religious exercises are as follows :—

“(6) Religious exercises in the public schools shall be conducted according to the regulations of the advisory board. The time for such religious exercises shall be just before the closing hour in the afternoon. In case the parent or guardian of any pupil notifies the teacher that he does not wish such pupil to attend such religious exercises then such pupil shall be dismissed before such religious exercises take place.

“(7) Religious exercises shall be held in a public school entirely at the option of the school trustees for the district, and upon receiving written authority from the trustees it shall be the duty of the teachers to hold such religious exercises.

[457] “(8) The public schools shall be entirely non-sectarian, and no religious exercises shall be allowed therein except as above provided.”

The Act then provides for the formation, alteration, and union of school districts, for the election of school trustees, and for levying a rate on the taxable property in each school district for school purposes. In cities the municipal council is required to levy and collect upon the taxable property within the municipality such sums as the school trustees may require for school purposes. A portion of the legislative grant for educational purposes is allotted to public schools ; but it is provided that any school not conducted according to all the provisions of the Act, or any Act in force for the time being, or the regulations of the Department of Education, or the advisory board, shall not be deemed a public school within the meaning of the law and shall not participate in the legislative grant. Sect. 141 provides that no teacher shall use, or permit to be used as text books, any books except such as are authorized by the advisory board, and that no portion of the legislative grant shall be paid to any

school in which unauthorized books are used. Then there are two sections (178 and 179) which call for a passing notice, because, owing apparently to some misapprehension, they are spoken of in one of the judgments under appeal as if their effect was to confiscate Roman Catholic property. They apply to cases where the same territory was covered by a Protestant school district and by a Roman Catholic district. In such a case Roman Catholics were really placed in a better position than Protestants. Certain exemptions were to be made in their favour if the assets of their district exceeded its liabilities, or if the liabilities of the Protestant school district exceeded its assets. But no corresponding exemptions were to be made in the case of Protestants.

Such being the main provisions of the Public Schools Act, 1890, their Lordships have to determine whether that Act prejudicially affects any right or privilege with respect to denominational schools which any class of persons had by law or practice in the Province at the union.

Notwithstanding the Public Schools Act, 1890, Roman [458] Catholics and members of every other religious body in Manitoba are free to establish schools throughout the Province ; they are free to maintain their schools by school fees or voluntary subscriptions ; they are free to conduct their schools according to their own religious tenets without molestation or interference. No child is compelled to attend a public school. No special advantage other than the advantage of a free education in schools conducted under public management is held out to those who do attend. But then it is said, that it is impossible for Roman Catholics or for members of the Church of England (if their views are correctly represented by the Bishop of Rupert's land, who has given evidence in Logan's case) to send their children to public schools where the education is not superintended and

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directed by the authorities of their Church, and that therefore Roman Catholics and members of the Church of England who are taxed for public schools, and at the same time feel themselves compelled to support their own schools, are in a less favourable position than those who can take advantage of the free education provided by the Act of 1890. That may be so. But what right or privilege is violated or prejudicially affected by the law? It is not the law that is in fault. It is owing to religious convictions, which everybody must respect, and to the teaching of their Church, that Roman Catholics and the members of the Church of England find themselves unable to partake of advantages which the law offers to all alike.

Their Lordships are sensible of the weight which must attach to the unanimous decision of the Supreme Court. They have anxiously considered the able and elaborate judgments by which that decision has been supported. But they are unable to agree with the opinion which the learned judges of the Supreme Court have expressed as to the rights and privileges of Roman Catholics in Manitoba at the time of the union. They doubt whether it is permissible to refer to the course of legislation between 1871 and 1890, as a means of throwing light on the previous practice or on the construction of the saving clause in the Manitoba Act. They cannot assent to the view, which seems to be indicated by one of the members of the Supreme Court, that public schools under the Act [459] of 1890 are in reality Protestant schools. The Legislature has declared in so many words that "the public schools shall be entirely unsectarian," and that principle is carried out throughout the Act.

With the policy of the Act of 1890 their Lordships are not concerned. But they cannot help observing that, if the views of the respondents were to prevail, it would be extremely difficult for the Provincial Legislature, which



has been entrusted with the exclusive power of making laws relating to education, to provide for the educational wants of the more sparsely inhabited districts of a country almost as large as Great Britain, and that the powers of the Legislature, which on the face of the Act appear so large, would be limited to the useful but somewhat humble office of making regulations for the sanitary conditions of schoolhouses, imposing rates for the support of denominational schools, enforcing the compulsory attendance of scholars, and matters of that sort.

In the result their Lordships will humbly advise Her Majesty that these appeals ought to be allowed with costs. In the *City of Winnipeg v. Barrett*, it will be proper to reverse the order of the Supreme Court with costs, and to restore the judgment of the Court of Queen's Bench for Manitoba. In the *City of Winnipeg v. Logan* the order will be to reverse the judgment of the Court of Queen's Bench and to dismiss Mr. Logan's application, and discharge the rule nisi and the rule absolute with costs.

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#### JUDGMENTS IN SUPREME COURT OF CANADA.

[*Reported 19 Can. S. C. R. 374.*]

RITCHIE, C.J. :—

This is an application to quash two by-laws of the municipal corporation of the city of Winnipeg, which were passed for levying a rate for municipal and school purposes in that city for the year 1890, and they assess all real and personal property in the city for [383] such purpose. It is asked that these by-laws be quashed for illegality on the following, among other grounds: That because by the said by-laws the amounts to be levied for school purposes for the Protestant and Roman Catholic schools are united, and one rate levied upon Protestants and Roman Catholics alike for the whole sum.

It must be assumed that in legislating with reference to a constitution for Manitoba, the Dominion Parliament was well acquainted with the conditions of the country to which it was about to give a

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constitution, and they must have known full well that at that time there were no schools established by law, religious or secular, public or sectarian. In such a state of affairs, and having reference to the condition of the population, and the deep interest felt and strong opinions entertained on the subject of separate schools, it cannot be supposed that the Legislature had not its attention more particularly directed to the educational institutions of Manitoba, and more especially to the schools then in practical operation, their constitution, mode of support and peculiar character in matters of religious instruction. To have overlooked considerations of this kind is to impute to Parliament a degree of short-sightedness and indifference which, in view of the discussions relating to separate schools which had taken place in the older Provinces, or some of them, and to the extreme vigilance with which educational questions are scanned and the importance attached to them, more particularly by the Catholic Church as testified to by Monseigneur Tache, cannot to my mind be for a moment entertained. Read in the light of considerations such as these must we not conclude that the Legislature well weighed its language and intended that every word it used should have force and effect?

The British North America Act confers on the Local Legislature [384] the exclusive power to make laws in relation to education, provided nothing in such laws shall prejudicially affect any right or privilege, with respect to denominational schools, which any class of persons had by law in the Province at the union, but the Manitoba Act goes much further and declares that nothing in such law shall prejudicially affect any right or privilege with respect to denominational schools which any class of persons had by law or practice in the Province at the union. We are now practically asked to reject the words "or practice" and construe the statute as if they had not been used, and to read this restrictive clause out of the statute as being inapplicable to the existing state of things in Manitoba at the union, whereas on the contrary, I think, by the insertion of the words "or practice" it was made practically applicable to the condition at the time of the educational institutions, which were, unquestionably and solely as the evidence shews, of a denominational character. It is clear that at the time of the passing of the Manitoba Act, no class of persons had by law any rights or privileges secured to them; so if we reject the words "or practice" as meaningless or inoperative we shall be practically expunging the whole of the restrictive clause from the statute. I know of no rule of construction to justify such a proceeding unless the clause is wholly unintelligible or incapable of any reasonable construction.

The words used, in my opinion, are of no doubtful import, but are, on the contrary, plain, certain, and unambiguous, and must be read in their ordinary grammatical sense. Effect should be given to all the words in the statute, nothing adding thereto nothing diminishing therefrom, as was said by Tindall, C.J., in *Everett v. Wells* (1).

[385] The Legislature must be understood to mean what it has plainly expressed, and this excludes construction. See *Rex v. Banbury* (2).

It is a settled canon of construction that no clause, sentence, or word shall be construed superfluous, void, or insignificant if it can be prevented. See *Reg. v. Bishop of Oxford* (3).

While it is quite clear that at the time of the passing of this Act there were no denominational or other schools established and recognised by law, it is equally clear that that there was at that time in actual operation or practice a system of denominational schools in Manitoba well established, and the de facto rights and privileges of which were enjoyed by a large class of persons. What then was there more reasonable than that the Legislature should protect and preserve to such class of persons those rights and privileges they enjoyed in practice, though not theretofore secured to them by law, but which the Dominion Parliament appears to have deemed it just should not, after the coming into operation of the new provincial constitution, be prejudicially affected by the action of the Local Legislature?

I quite agree with the cases cited by the learned Chief Justice of Manitoba as to the rules by which the Act should be construed. I agree that the Court must look not only at the words of the statute but at the cause of making it, to ascertain the intent. When we find the Parliament of Canada altering and adding to the language of the British North America Act by inserting a limitation not in the British North America Act, must we not conclude that it was done advisedly? What absurdity, inconsistency, injustice, or contradiction is there in giving the words "or practice" a literal construction, more especially, as I have endeavoured to shew, as the literal meaning is the only meaning the words are [386] capable of and is entirely consistent with the manifest intention of the Legislature, namely, to meet the exigencies of the country, and cover denominational schools of the class practically in use and operation? If the literal meaning is not to prevail, I have yet to hear what other meaning is to be attached to the

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(1) 2 Scott (N. R.) 531.

(2) 1 A. & E. 136, 142.

(3) 4 Q. B. D. 245, 261.



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words "or practice." If the Legislature intended to protect the classes of persons who had founded and were carrying on denominational schools of the character of those which existed at the time of the passing of the Act, I am at a loss to know what other words they could more aptly have used. They might, it is true, have said "which any class of persons has by law or usage," but the words "practice" and "usage" are synonymous. I agree, also, that we should ascertain what the language of the Legislature means, in other words, to suppose that Parliament meant what Parliament has clearly said.

It cannot be said that the words used do not harmonize with the subject of the enactment and the object which I think the Legislature had in view. If the Legislature intended to recognise denominational schools, how could they have used more expressive words to indicate their intention, since the words used, read in their ordinary grammatical sense, admit of but one meaning, and therefore one construction? And we should not speculate on the intention of the Legislature, that intention being clearly indicated by the language used, in view of the condition of and the state of education in that country. The object the Legislature must have had in view in using them, was clearly to protect the rights and privileges with respect to denominational schools which any class of persons had by law or practice, that is to say, had by usage, at the time of the union. I cannot read the language of the Act in any other sense.

[387] The decision of the Court of New Brunswick in the case of *Ex parte Renaud* (1) referred to in the court below has no application in this case. That case turned entirely on the fact that the Parish School Act of New Brunswick, 21 Vict. c. 9, conferred no legal rights on any class of persons with respect to denominational schools. It was there simply determined that there were no legal rights with respect to denominational schools, and therefore no rights protected by the British North America Act a very different case from that we are now called upon to determine. It may very well be that, in view of the wording of the British North America Act and the peculiar state of educational matters in Manitoba, the Dominion Parliament determined to enlarge the scope of the British North America Act, and protect not only denominational schools established by law, but those existing in practice, for as I am reported to have said, and no doubt did say, in *Ex parte Renaud* (1) that in that case, "We

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(1) 1 Pugsley 273; *ante*, vol. 2, p. 445.

must look to the law as it was at the time of the union, and by that and that alone be governed."

Now, on the other hand, in this case we must look to the practice with reference to the denominational schools as it existed at the time of the passing of the Manitoba Act.

That this was the view taken by the Legislature of Manitoba would seem to be indicated by the legislation of that Province up to the passing of the Public Schools Act, which very clearly recognised denominational schools, and made provision for their maintenance and support, providing that support for Protestant schools should be taxed on Protestants, and for Catholic schools should be taxed on Catholics, and conferring the management and control of Protestant schools on Protestants, and the like management and [388] control of Catholic schools on Catholics. This denominational system was most effectually wiped out by the Public Schools Act, and not a vestige of the denominational character left in the school system of Manitoba. Mr. Justice Dubuc gives an accurate synopsis of the legislation prior to the passing of the Public Schools Act.

The only question it strikes me we are now called upon to consider is: Does this Public School Act prejudicially affect the class of persons who in practice enjoyed the rights and privileges of denominational schools at the time of the union? Now, what were the provisions of the Public Schools Act? Mr. Justice Dubuc likewise gives a synopsis of the Public Schools Act as follows:—

(His Lordship here read that portion of the judgment of Dubuc, J., and proceeded:—)

But it is said that the Catholics as a class are not prejudicially affected by this Act. Does it not prejudicially, that is to say injuriously, disadvantageously, which is the meaning of the word "prejudicially," affect them when they are taxed to support schools of the benefit of which, by their religious belief and the rules and principles of their Church, they cannot conscientiously avail themselves, and at the same time, by compelling them to find means to support schools to which they can conscientiously send their children, or, in the event of their not being able to find sufficient means to do both, to be compelled to allow their children to go without either religious or secular instruction? In other words, I think the Catholics were directly prejudicially affected by such legislation, but, whether directly or indirectly, the Local Legislature was powerless to affect them prejudicially in the matter of denominational schools, which they certainly did by practically depriving

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[389] them of their denominational schools and compelling them to support schools the benefit of which Protestants alone can enjoy.

In my opinion the Public Schools Act is ultra vires, and the by-laws of the city of Winnipeg, Nos. 480 and 483, should be quashed and this appeal allowed with costs.

STRONG, J. :—

I have read the judgment prepared by the Chief Justice, and entirely concur in the conclusion at which he has arrived, as well as in the reasons he has given therefor. I have nothing to add to what he has said.

[Translated.]

FOURNIER, J. :—

It is by a petition for the quashing of by-laws 480 and 483 of the municipal council of Winnipeg that the appellant has raised in this case the important question of the legality of the Act 53 Vict. c. 38, respecting the public schools of Manitoba.

By the two by-laws passed under the authority of the new School Act and the provisions of the Municipal Act, a tax of two cents in the dollar is imposed on the value of real and personal property in the city of Winnipeg. The proportion of this tax appropriated to schools is fixed at 4 1-5 mills in the dollar.

The ground of illegality relied on is that by the by-laws a single tax is imposed uniformly on Catholics and Protestants for the support of schools.

This ground is thus stated :—“ Because by the said by-laws the amounts to be levied for school purposes for the Protestant and Catholic schools are united and one rate levied upon Protestants and Catholics alike for the whole sum.”

This question came before the honourable Judge Killam, who decided in favour of the constitutionality of the Act and the [39<sup>th</sup>] legality of the by-laws in question. His judgment has been affirmed by the majority of the Supreme Court of Manitoba. This latter judgment it is which is now submitted to the consideration of this Court.

By the Act 53 Vict. c. 38, the system of separate schools, Catholic and Protestant which had been established in accordance with the constitutional Act of Manitoba, 33 Vict. c. 3, was completely abolished after having been in force for nineteen years.

It is important for the decision of this question to carry oneself back to the circumstances which preceded the entrance of that



Province into the Canadian confederation. We remember that it was at the close of a rebellion which had thrown the population into a profound and violent agitation, aroused religious and national passions, and occasioned great disorders, necessitating the intervention of the Federal Government. It was with the object of re-establishing public peace and conciliating the population that the Federal Government granted to them the constitution which they have until now enjoyed.

The principle of separate schools introduced into the British North America Act by sect. 93 was also introduced into the constitution of Manitoba, and declared to be applicable to the separate schools which existed in fact in this territory before its organization into a Province. The population was then divided almost equally between Catholics and Protestants.

While giving to the Province the power to legislate respecting education, sect. 22, sub-sect. 1 adds to the restriction contained in sect. 93 of the British North America Act of not prejudicially affecting any right or privilege conferred by law with respect to denominational schools, that of not prejudicially affecting separate schools existing by practice.

It is on this extension of the prohibition of sect. 93 protecting [391] separate schools established by practice that the legislature of Manitoba acted in order to introduce the principle of separate schools, both Protestant and Catholic, in the first School Act which it passed after its organization. To this end it was decreed by this Act that the Lieutenant-Governor in Council should have power to nominate a board of education composed of not less than ten and not more than fourteen persons, of whom half should be Catholics and half Protestants, and two superintendents—one for the Protestant and the other for the Catholic schools—who should be joint secretaries of the board.

The duties of the board are defined as follows :—1. To make from time to time the regulations which they should deem advisable for the organization of common schools. 2. To choose books, maps and globes for the use of the common schools, taking care to choose English books, maps and globes for the English schools, and French books for the French schools; but this power was not to be extended to the choice of books respecting religion and morals, the choice of these being regulated by a subsequent clause. 3. To change and sub-divide, with the sanction of the Lieutenant-Governor, every school district established in virtue of this Act. Sub-sect. 12 gives the board power to prescribe for the use of the schools, books respecting religion and morals. By sub-sect. 13

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moneys appropriated by the legislature for education were to be divided equally, one-half for the support of Protestant schools and the other half for that of Catholic schools.

The first board nominated by the Lieutenant-Governor in Council was composed of the Archbishop of St. Boniface, the Bishop of Rupert's Land, several Catholic priests and Protestant ministers of different denominations, and two laymen for each section.

[392] This Act has been amended from time to time in order to satisfy fresh needs as the establishments developed and the population increased, while always preserving the same system of having separate schools for Catholics and Protestants. The only changes of importance were by the Act of 1875, viz: the increase of the number of members of the board to twenty-one—twelve Protestants and nine Catholics—and the division of the money voted by the Legislature between Protestants and Catholics in proportion to the number of children of age to attend school in each district, Catholic or Protestant.

Aside from these changes, the system of separate schools and the independent action of the two sections of the board were more and more confirmed by the subsequent statutes. Sect. 27 of the Act of 1875, cap. 27, provides that the establishment in a district of a school of one denomination shall not prevent the establishment of a school of another denomination in the same district. This principle is somewhat extended, and practically applied by sects. 39, 40 and 41 of the Act of 1876, cap. 1.

Such is the state of affairs which has existed with respect to education since the entrance of the Province of Manitoba into confederation. It is in virtue of the provisions of the constitutional Act, confirmed by an Act of the Imperial Parliament, that all the Acts of the Province establishing the system of separate schools have been introduced and regulated.

Although before this period there had not been, properly speaking, a system of public education, the Protestants and Catholics had long been in the habit of maintaining, on their own account respectively and at their own cost and charges, schools which were in fact separate schools, in which the teaching was in accordance with the principles of each denomination. In his affidavit to this [393] effect, produced in support of the contentions of the appellant, and the facts of which are not disputed by the other side, Archbishop Tache describes the state of things then existing as follows:—  
“Prior to the passage of the Act of the Dominion of Canada, passed in the 33rd year of the reign of Her Majesty Queen Victoria, cap.



3, known as the Manitoba Act, and prior to the Order in Council issued in pursuance thereof, there existed in the territory now constituting the Province of Manitoba a number of effective schools for children. These schools were denominational schools, some of them being regulated and controlled by the Roman Catholic Church and others by various Protestant denominations. The means necessary for the support of the Roman Catholic schools were supplied to some extent by school fees paid by some of the parents of the children who attended the schools, and the rest were paid out of the funds of the Church, contributed by its members. During the period referred to, Roman Catholics had no interest in or control over the schools of the Protestant denominations, and the members of the Protestant denominations had no interest in or control over the schools of Roman Catholics. There were no public schools in the sense of State schools. The members of the Roman Catholic Church supported the schools of their own Church for the benefit of Roman Catholic children, and were not under obligation to, and did not contribute to the support of, any other schools. In the matter of education, therefore, during the period referred to, Roman Catholics were, as a matter of custom and practice, separate from the rest of the community, and their schools were all conducted according to the distinctive views and beliefs of Roman Catholics as herein set forth."

In the same affidavit the Archbishop asserts that the Church considers the schools established in virtue of the Public Schools Act as unfit for the education of Catholic children, and that the children will not attend them; that rather than encourage these schools the Catholics will prefer to return to the system existing before the Manitoba Act, and will establish and maintain schools in conformity with the principles of their faith; that the Protestants are satisfied with the system of education established by the Public School Act because these schools resemble those which they maintained before the repeal of the former Acts introducing the system of separate schools over which they had absolute control.

[394]The affidavits in opposition to the motion establish that the schools existing before the entrance of Manitoba into the confederation were merely private schools, not subject to control on the part of the public and not receiving any subsidy from it. There were no taxes imposed by authority for that object, and there was no legal method of forcing the public to contribute to the support of these private schools.

The affidavits furnished on both sides are not in any respect con-

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tradictory and give a correct idea of the position of the schools existing in the territory, which has since formed the Province of Manitoba. The result of these affidavits is to clearly prove that the schools then existing, though not established by any law, were in fact and in practice denominational schools. It is this state of things which has been sanctioned by sect. 22 of the constitutional Act of Manitoba by the declaration that nothing in the laws which shall be passed by the Legislature shall prejudicially affect any right or privilege with respect to denominational schools which any class of persons have by law or practice in the Province at the union.

This provision is the source of the power exercised by the Legislature of Manitoba in virtue of the Act 34 Vict. c. 12, which confirmed and approved the system of separate schools previously existing. We have seen from its principal provisions already cited that the control exercised by the Protestants and Catholics over their respective schools had been preserved to them by this law and by those subsequently passed until the Act 53 Vict. c. 38.

At the session of 1890 the legislature passed two Acts on the subject of education; the first, cap. 37, abolished the board of education previously existing as well as the office of superintendent of education and created a department of education formed of the [395] executive, or of a committee taken therefrom nominated by the Lieutenant-Governor in Council, and of a board of advisers composed of seven members, of whom four are nominated by the department of education, two by the school teachers of the Province and one by the council of the University. Among other duties the board of advisers has the power of examining and authorizing text books and books of reference for use in the schools and school libraries; of defining the qualifications of teachers and inspectors of schools; of nominating the persons charged with preparing examination schedules and of prescribing the forms of religious exercises to be used in the schools.

The other Act is the Public School Act, cap. 38, the constitutionality of which is attacked. It repeals all the statutes in force respecting education, and declares by sect. 3 that all the school districts, Protestant and Catholic, as well as the elections and nominations to any office, contracts, assessments previously made on the subject of Catholic and Protestant schools and in existence at the time of its coming in force shall be subject to the provisions of the Act; sect. 4 continues in office the trustees existing at the time the Act came in force as if they had been elected in virtue of its provisions. By sect. 5 all public schools are to be free and all children between the ages of five and sixteen in rural municipalities and

between the ages of six and sixteen in towns are to have a right to attend them : Sect. 6. The religious exercises in the public schools are to be conducted in accordance with the regulations of the board of advisers. The time for these exercises is fixed and if the parents do not wish that their children should take part in them they are to be dismissed before these exercises. By sect. 7 the religious exercises are optional with the school trustees for the district, and on receipt of a written authority from the trustees the teachers are [396] obliged to perform these religious exercises. The public schools are not to be sectarian, and no religious exercise is to be permitted in them except in the manner above prescribed.

The Act provides for the establishment of school districts in the rural municipalities and in towns and villages, for the election of school trustees and the imposition of taxes for school purposes.

Sect. 92 enacts that :

“The municipal council of every city, town and village shall levy and collect on the assessable property within the limits of the municipality, and in the manner prescribed by this Act and by the Municipal and Assessment Acts such sums as shall be required by the school trustees for school purposes.”

Sect. 108 contains on the subject of the legislative grant for schools the following provision :

“Every school which shall not be conducted in accordance with the provisions of this Act or of any other Act then in force, or in accordance with the regulations of the department of education, or of the board of advisers, will not be considered a public school according to law and will not have any share of the legislative grant.”

Sect. 143 directs that teachers shall not use other school books than those authorized by the board of advisers, and that no part of the legislative grant shall be paid to schools using unauthorized books.

By sect. 179 : “In cases where before the coming in force of this Act Catholic school districts have been established as mentioned in the preceding section embracing the same territory as a Protestant district, such Catholic school district on the coming into force of this Act shall cease to exist, and all the property of such district, together with its debts, shall belong to the public school district.”

These provisions as a whole have produced a complete change in the system of education. The statute has destroyed not only the sections of the former law establishing separate schools, but has even proscribed the use of the terms “Catholic and Protestant denominations.” In cases where a Catholic school district embraces

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[397] the same territory as a Protestant district, sect. 179 goes so far as to confiscate property of the Catholic district and transfer it to the Protestant district designated public school.

This analysis of the principal provisions of the Act 53 Vict. c. 38, shews that the Legislature of Manitoba, after having established in accordance with the power given to it by its constitution a system of separate schools, has completely abolished this system and organized another directly opposed to the former in which it destroys the right to separate schools as it existed previously in order to substitute for it another founded on the non-sectarian principle excluding religious teaching from the schools, and leaving to the school trustees the choice of books respecting religion and morals to be used in these schools.

The system thus established is entirely contrary to the religious ideas of Catholics and to the doctrine of the Roman Catholic Church, and takes from them the right recognised by the Manitoba Act of having separate schools.

Does not this legislation exceed the power of the legislature? Is it not in direct opposition to sect. 22 of the Manitoba Act and consequently ultra vires?

Sect. 93 of the British North America Act in giving to the legislatures of the Provinces the power to legislate on the subject of education imposes the following restriction:—

“Nothing in any such law shall prejudicially affect any right or privilege with respect to denominational schools which any class of persons have by law in the Province at the union.”

This provision has been introduced in sub-sect. 1 of sect. 22 of the Manitoba Act with the difference alone that the words “or practice” are added after the words “by law,” so that the section now reads therein as follows:—

“Nothing in any such law shall prejudicially affect any right or privilege with respect to denominational schools which any class of persons have by law or practice in the Province.”

The solution of the question rests then entirely on the interpretation to be given to the words “or practice” introduced in sect. 22, and which are not found in sect. 93 of the British North America Act. Evidently this addition has not been made without reason, and the meaning of it should be found by the application of the rules respecting the interpretation of statutes furnished by the authorities.

One of the first rules is, that when the terms of a statute admit of only one meaning, the Court has not power to seek for the intention of the legislature in order to interpret an Act according to its



own notions of what the Act should have enacted : Maxwell on Statutes, page 6 ; *York & North Midland Railway Co. v. Reg.* (1).

Where the language is precise and unambiguous, but at the same time incapable of reasonable meaning and the Act is consequently inoperative, a Court is not at liberty to give the words on merely conjectural grounds a meaning which does not belong to them : Maxwell on Statutes, page 23. This rule applies only to cases in which the language is precise and susceptible of but one meaning.

The words "or by practice" inserted in sect. 22 of the Manitoba Act have not in truth a technical meaning, although in ordinary language they have one which is very clear and little capable of ambiguity. It is, however, asserted that they mean that the Roman Catholics, although forced to contribute to the support of public schools, have power to maintain separate schools as private schools. This is a very narrow interpretation and contradicts the terms of sect. 22. It is asserted also that they secure freedom from attending the public schools ; but the most liberal and most sensible interpretation is without doubt that as separate schools existed as a fact at the time of the union, these words were introduced in the Manitoba Act in order to give them a legal existence of such a character as would prevent the Local Legislature from legislating to their hurt.

If the words "or by practice" admitted of a different interpretation we might apply to them an old rule of interpretation which declares that a thing which is within the letter of a statute is not within the statute unless it be also within the meaning of the legislature (2). It is then the intention of the legislature which must be sought for in order to form a just idea of the meaning of the words "by practice."

Maxwell says besides at page 27 :—"To arrive at the real meaning it is always necessary to take a broad, general view of the Act so as to get an exact conception of its aim, scope and object. It is necessary, according to Lord Coke, to consider, 1. What was the law before the Act was passed ; 2. What was the mischief or defect for which the law had not provided ; 3. What remedy Parliament has appointed ; and 4. The reason of the remedy." This rule was enunciated in *Heydon's Case* (3) decided in the reign of Elizabeth and has been followed ever since.

It is often necessary in order to find the true meaning of the [400] words used in a statute to trace up the history of the subject

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(1) 1 E. & B. 858.

(2) Maxwell on Statutes (2nd ed.) p. 24 ; Bac. Abr. Statute (I.) 5.

(3) 3 Rep. 7 b.

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and examine the special circumstances which have induced the legislature to adopt the provision.

In the case of *River Wear Commissioners v. Adamson* (1) Lord Blackburn says at page 763 :—" I shall state as precisely as I can, what I understand from the decided cases to be the principles on which the Courts of Law act in construing instruments in writing ; and a statute is an instrument in writing. In all cases the object is to see what is the intention expressed by the words used. But, from the imperfection of language, it is impossible to know what that intention is without inquiring farther, and seeing what the circumstances were with reference to which the words were used, and what was the object, appearing from those circumstances, which the person using them had in view ; for the meaning of words varies according to the circumstances with respect to which they were used."

" In the interpretation of statutes," says Maxwell at page 30 with reference to the case of *Gorham v. Bishop of Exeter* (2), " the interpreter, in order to understand the subject matter and the scope and object of the enactment, must, in Coke's words, ascertain what was the mischief or defect for which the law had not provided ; that is, he must call to his aid all those external or historical facts which are necessary for this purpose, and which led to the enactment, and for these he may consult contemporary or other authentic works and writings."

In *Attorney-General v. Sillem* (3), Lord Bramwell says :—" It may be a legitimate mode of determining the meaning of a doubtful document to place those who have to expound it in the situation of those who made it ; and so, perhaps, history may be referred to, to shew what facts existed, bringing about a statute, and what matters influenced men's minds when it was made."

Lord Justice Turner in the case of *Hawkins v. Gathercole* (4) says : " In construing Acts of Parliament the words which are used are not alone to be regarded. Regard must also be had to the intent and meaning of the legislature. The rule upon the subject is well expressed in the case of *Stradling v. Morgan* (5). . . . The same doctrine is to be found in *Eyston v. Studd* (6). In determining the [401] question before us we have therefore to consider not merely the words of the Act of Parliament but the intent of the legislature to be collected from the cause and necessity of the Act being made, from a comparison of its several parts, and from foreign

(1) 2 App. Cas. 743.

(2) Moore's Rep. p. 462.

(3) 2 H. & C. 431, 531.

(4) 6 De G. M. & G. 1, 20, 21.

(5) Plowd. 204.

(6) Plowd. 459.



(meaning extraneous) circumstances so far as they can justly be considered to throw light upon the subject."

In *Holme v. Guy* (1), Jessel M. R., says :—"The Court is not to be oblivious . . . of the history of law and legislation. Although the Court is not at liberty to construe an Act of Parliament by the motives which influenced the legislature, yet when the history of law and legislation tells the Court, and prior judgments tell this present Court, what the object of the legislature was, the Court is to see whether the terms of the section are such as fairly to carry out that object and no other, and to read the section with a view of finding out what it means, and not with a view to extending it to something that was not intended."

For the purpose of establishing the true meaning of the words "by practice" these authorities justify us in examining the circumstances and motives which caused their introduction into the statute.

Sect. 93 of the British North America Act gives to the legislature of each Province the exclusive power to make laws respecting education subject, however, to certain restrictions of which the first is that nothing in these laws shall prejudicially affect any right or privilege which any class of persons possesses by law. The first sub-section of sect. 22 of the Manitoba Act adds to this prohibition that of prejudicially affecting the rights conferred on any class of persons by practice as well as those conferred by law.

What was the reason for the introduction of that restriction in sect. 93 and for what reasons was it extended to the right which was based only on the practice in Manitoba at the time of the passage of the Act 33 Vict. c. 3?

When the Provinces of Ontario, Quebec, Nova Scotia and New Brunswick formed the confederation each had a complete system [402] of public schools established by law. In Ontario and Quebec the law allowed to the minorities of a different belief from that of the majority the right of having separate schools. In establishing these schools the minorities were exempt from contributing to the support of the public schools and had a right to a share of the public grant.

In Upper Canada (Ontario) the question of separate schools had formed the subject of fierce and violent quarrels between Protestants and Catholics but had been at last regulated by the School Act of 1863 which had re-established peace and harmony in the Province.

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In Nova Scotia and New Brunswick it was otherwise, although in fact the Catholics there had their own schools in virtue of the common school or parish school law, but these schools were not recognised as separate schools and the Catholics there had no right or privilege on this subject by law.

The authors of confederation, in order to avoid a renewal of the agitation which had existed on this subject in the old Province of Canada between Catholics and Protestants while granting to the provinces the right of legislating on the subject of education wisely adopted provisions for the protection of the rights and privileges of the minorities by prohibiting all legislation which should injure existing rights and privileges.

This restriction ought to apply to every new province which should subsequently enter the confederation as well as to those which originally formed part of it.

A question respecting the extent of this restriction was raised in New Brunswick. The law in force on this subject at the time of confederation was the Parish School Act of 1858. In 1871 the [403] legislature passed an Act respecting common schools to which the Roman Catholics much objected. Petitions were addressed to the legislature and to the Parliament of Canada to prevent the enforcement of the Act. At last the question was brought before the Supreme Court of New Brunswick and the Court in a very elaborate judgment pronounced by Sir W. J. Ritchie, then Chief Justice of the Supreme Court of New Brunswick, decided that the Catholics of New Brunswick had not by law, at the time of confederation, any right or privilege with respect to separate schools. In the course of his observations the honourable Chief Justice thus expresses himself:—"Where is there anything that can with propriety be termed a legal right? Surely the legislature must have intended to deal with legal rights and privileges? How is it to be defined? How enforced?"

And further on:—"If the Roman Catholics had no legal rights as a class to claim any control over or to insist that the doctrines of their Church should be taught in all or any schools under the Parish Schools Act, how can it be said (though as a matter of fact such doctrines may have been taught in numbers of such schools) that as a class of persons they have been affected in any legal right or privilege with respect to "Denominational Schools," construing those words in their ordinary meaning, because under the Common Schools Act, 1871, it is provided that the schools shall be non-sectarian."

This decision was afterwards affirmed by the Privy Council. It is easy to see by the reasons given in support of this decision and by the importance attached to the expression "legal rights," that if the rights which the Catholics had by practice had been specially mentioned as well as those existing by law the decision would have been different.

Mr. Ewart, counsel for the appellants, having remarked that the words "by practice" had been introduced into the Manitoba Act in order to prevent the difficulties which had arisen in New [404] Brunswick, the Attorney-General, counsel for the respondent, observed that the School Act had been passed in 1871, a year after the Manitoba Act; but he should have added that this suggested legislation was for a long time before the legislature and the public and formed the subject of animated discussion. The honourable Geo. A. King had introduced this measure in 1869 for the first time and again a second time on the 24th of February, 1870, when it was referred to a committee of the whole house and discussed on the 17th, the 22nd and the 31st of March and the 1st of April. This law was not to come in force until a year after it was passed.

The Act of Manitoba, passed by the Dominion Parliament, did not become law until the 12th day of May, 1870, more than a month after the discussion on the School Act of New Brunswick and more than a year after its first introduction into that legislature.

Is it surprising that the discussions which took place on this subject at different times should have been reported and commented on by the public, as is usually the case, and should have come to the knowledge of the members of the Federal Government and of the House of Commons? It is a fact that the agitation caused by this Bill was known to the whole House of Commons, and no doubt it was for the purpose of preventing the return of a like agitation that the words "by practice" were added in sect. 22 of the Manitoba Act.

The existence of separate schools in Manitoba before the formation of the Province was known as well as the fact that there was no law in existence for the protection of minorities—Catholic or Protestant—who might desire to preserve their separate schools. These facts we must presume were known to the legislators. As there was not then any law respecting separate schools or any other kind of school, sub-sect. 1 of sect. 93 or its introduction [405] into the Manitoba Act would not have produced any effect. Roman Catholics of this Province would have found themselves in

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a worse position than in New Brunswick, for there at least, as it is stated in the judgment in the *Renard Case* (1), the Catholics, without having a right to it by law, caused their doctrines to be taught in the existing schools.

The authors of the Manitoba Act might well be struck with this state of things and it was doubtless for the purpose of remedying it that they inserted in sect. 22 the words "by practice," which do not occur in sect 93, with the object of assuring thereafter to the minorities—Catholic or Protestant—the right to separate schools which they then enjoyed "by practice." The Legislature of Manitoba also so well understood the intention with which the Federal Parliament introduced the words "by practice" in the Manitoba Act that by its first Act respecting schools it established a complete system of Catholic and Protestant separate schools which has existed for nineteen years. Its interpretation of the words "by practice" has been in conformity with the spirit of the legislation and rules of interpretation.

If sect. 22 had only contained the terms of sub-sect. 1 of sect. 93 it would not have protected the rights of the minorities because the terms "rights and privileges by law" could not have been applied to the state of things existing in Manitoba, where separate schools had not any legal existence but were long since established by the practice of the country.

The addition of the terms "by practice" was indispensable to meet the case, provision for which was in question.

If it is true that these terms have not a technical meaning, it is no less true that in the circumstances in which they have been [406] employed they have a clear and precise meaning and convey exactly the idea it was desired to express of that which, without legal sanction, existed in fact by the custom and habits of the country. It is an ordinary expression and one which should be interpreted in its ordinary and popular meaning. The terms "by law" and "by practice" signify evidently different things and the addition of the words "by practice" shew clearly that the legislature intended to extend the prohibition for the purpose of applying it to the special case of the Province. These words have not been placed there by accident and without an object. The position of the separate schools existing in fact was known to the authors of the Act at least through the delegates who had been sent to settle the conditions of the entrance of the Province into the confederation. The question was without doubt discussed fully and it was in order to settle it definitely that the

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(1) 1 Pugsley, 273; *ante*. vol. 2, p. 415.



words "by practice" were added in sect. 22 in such a way as to forbid all legislation to their prejudice.

It would be absurd to pretend that the privilege guaranteed to Catholics by the words "by practice" should be understood as that of having separate schools like private schools supported by themselves. This privilege existing of common right would not require any legislation and the expression "by practice" would be then altogether useless and without any meaning. The Federal Parliament, knowing of the existence in the territory of separate schools and the fact that there was no law authorizing them, while it desired to secure their legal existence after the union understood that the provisions alone of the British North America Act would not suffice for this object. It was without doubt for this reason that sect. 93 was modified by the addition of the words "by practice." It is then [407] a provision which instead of not having any meaning wisely fills an important gap which existed in the organization of the Province. It is in this case proper to apply the rule which requires that when the language of the law admits of two interpretations one of which would be absurd and the other reasonable and salutary the latter should be adopted as in accordance with the intention of the legislator.

In the case of *Reg. v. Monck* (1), Brett, L.J., says:—"Where a statute is capable of two constructions, one of which will work manifest injustice and the other will work no injustice, you are to assume that the legislature intended that which would work no injustice."

Lord Blackburn expresses the same opinion in the case of *Countess of Rothes v. Kirkcaldy Waterworks Commissioners* (2) where he says:—"I quite agree that no Court is entitled to depart from the intention of the legislature as appearing from the words of the Act, because it is thought unreasonable. But when two constructions are open the Court may adopt the more reasonable of the two."

It is not difficult to see which of these two constructions is the more reasonable and the more just. If the construction of the words "by practice" was not sufficient to give them the right to maintain their separate schools the Catholics would be taxed for schools which they would not be able to attend and of which the Protestants alone would have the benefit. While on the other hand if we give to the words "by practice" their true construction the schools of the Catholics will be recognised by law. These words "by practice" have without doubt been introduced into the

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(1) 2 Q. B. D., 544, 555.

(2) 7 App. Cas. 694, 702.

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Manitoba Act only for the purpose of assuring to those who should desire it the right to maintain their separate schools and of sanctioning their legal existence.

These reasons seem sufficient to prove that the law in question evidently violates the provision of sect. 22, sub-sect. 1 of [408] the Manitoba Act which prohibits all legislation of a kind to prejudicially affect separate schools.

It is moreover a rule of interpretation that in order to correctly interpret a law we should consider it, as a whole and compare its different provisions so as to grasp its true spirit. The Manitoba Act does not contain sect. 22 alone on the subject of separate schools. There are besides several other provisions on this subject, taken in part from sect. 93 of the British North America Act, of which the object evidently is to protect the right to separate schools granted by the first sub-section. Sub-sect. 2 grants an appeal to the Governor-General in Council from any act or decision of any provincial authority affecting any right or privilege of the Protestant or Roman Catholic minority of the Queen's subjects in relation to education.

By sub-sect. 3: "In case any such provincial law as from time to time seems to the Governor-General in Council requisite for the due execution of the provisions of this section is not made or in case any decision of the Governor-General in Council on any appeal under this section is not duly executed by the proper authority in that behalf, then, and in every such case and so far only as the circumstances of each case may require the Parliament of Canada may make remedial laws for the due execution of the provisions of this section and of any decision of the Governor-General in Council under this section."

The first sub-section in speaking of separate schools says that nothing shall prejudicially affect any right or privilege with respect to schools existing by law or practice; the second gives a right of appeal from any act or decision of the legislature or any other provincial authority affecting the rights or privileges of the Protestant [409] or Catholic minority in relation to education. If these minorities have any rights or privileges in relation to education they are undoubtedly those which concern their separate schools. They have their rights and privileges on this subject since the law gives a right of appeal in order to protect them from any attempt which should prejudicially affect them. Why should an appeal have been granted to them if they had no right to separate schools? Is it not on the contrary because they were already in possession of this right in practice that Parliament has sanctioned their legal



existence by this provision in such a way as to protect them against any assault from the legislature or any other provincial authority ?

The meaning given to the words "by practice" is thus found to be confirmed by the other provisions of sect. 22 in such a way as to leave no doubt of their meaning.

I am therefore of opinion that the Act 53 Vict. c. 38 respecting public schools is ultra vires and that the two by-laws adopted in virtue of this Act are illegal and should be set aside and the appeal allowed with costs.

[Translated.]

TASCHEREAU, J. :—

The appellant in this case attacks the constitutionality of the School Act passed by the Legislature of the Province of Manitoba in 1890. The proceedings before the provincial courts and the form under which the question is presented have been described at length by my learned colleagues who have preceded me, and it would be idle to repeat them. The question of right itself which is submitted to us is confined within a sufficiently narrow compass for the respondent and the Attorney-General of the Province in their factums and their arguments at the hearing as well as the learned judges of the Court appealed from in their judgments admit that the [410] Catholics of the Province are not and could not have been by the statute in question deprived of the right which they had always enjoyed of having their separate schools without being in any way obliged to send their children to the free schools. The litigation is only on the provisions of this statute which subjects Catholics to taxation for the support of free schools.

Sect. 22 of the constitutional Act of Manitoba of 1870 reads as follows in the French version which it must not be forgotten is law just as much as the English version :—" Dans la province, la legislature pourra exclusivement décréter des lois relatives à l'éducation sujettes et conformes aux dispositions suivantes : Rien dans ces lois ne pourra préjudicier à aucun droit ou privilège conféré lors de l'union par la loi ou par la coutume (or practice) à aucune classe particulière de personnes dans la province relativement aux écoles séparées (denominational schools)."

This is a verbatim copy of sect. 93 of the British North America Act with the simple addition of the words "or by practice." There are then rights and privileges which the Catholics of this region enjoyed at the time of the union with reference to separate schools (for law on the subject there was none) which the legislature is not

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able to prejudicially affect, and the power of legislating on education is only given to it with this restriction. This could not be disputed and the learned Attorney-General of the Province is only contesting the matter with the respondent in order to maintain that the Act, while obliging the appellant and with him all the Catholic population of Manitoba to contribute to the support of free schools, does not thereby prejudice any right or privilege conferred on them by practice. It is then necessary for us in the first place to seek in the record the proof of the practice in the matter of education in this part of the territory before the union. His Eminence the Lord Archbishop of St. Boniface, in an affidavit produced by the appellant, describes it in the following terms :—

[411] “ Prior to the passage of the Act of the Dominion of Canada passed in the thirty-third year of Her Majesty Queen Victoria, chapter 3, known as the Manitoba Act, and prior to the Order in Council issued in pursuance thereof, there existed in the territory now constituting the Province of Manitoba a number of effective schools for children. These schools were denominational schools, some of them regulated and controlled by the Roman Catholic Church and others by various Protestant denominations.

“ The means necessary for the support of the Roman Catholic schools were supplied to some extent by school fees paid by some of the parents of the children who attended the schools, and the rest was paid out of the funds of the Church, contributed by its members.

“ During the period referred to, Roman Catholics had no interest in or control over the schools of the Protestant denominations, and the members of the Protestant denominations had no interest in or control over the schools of Roman Catholics. There were no public schools in the sense of State schools. The members of the Roman Catholic Church supported the schools of their own Church for the benefit of the Roman Catholic children, and were not under obligation to, and did not contribute to, the support of any other schools.

“ In the matter of education, therefore, during the period referred to, Roman Catholics were, as a matter of custom and practice, separate from the rest of the community, and their schools were all conducted according to the distinctive views and beliefs of Roman Catholics as herein set forth.

“ Roman Catholic schools have always formed an integral part of the work of the Roman Catholic Church. That Church has always considered the education of the children of Roman Catholic parents as coming peculiarly within its jurisdiction. The school, in

the view of the Roman Catholics, is in a large measure the 'Children's Church,' and wholly incomplete and largely abortive if religious exercises be excluded from it. The Church has always insisted upon its children receiving their education in schools conducted under the supervision of the Church, and upon their being trained in the doctrines and faith of the Church. In education, the Roman Catholic Church attaches very great importance to the spiritual culture of the child, and regards all education unaccompanied by instruction in its religious aspect as possibly detrimental and not beneficial to children. With this regard the Church requires that all teachers of children shall not only be members of the Church, but shall be thoroughly imbued with its principles and faith; shall recognise its spiritual authority and conform to its directions. It also requires that such books be used in the schools with regard to certain subjects as shall combine religious instruction [412] with those subjects, and this applies peculiarly to all history and philosophy."

His Grace further swears that :—

"8. The Church regards the schools provided for by the Public Schools Act, and being Chapter 38 of the statutes passed in the reign of Her Majesty Queen Victoria, in the fifty-third year of her reign, as unfit for the purpose of educating their children, and the children of Roman Catholic parents will not attend such schools. Rather than countenance such schools, Roman Catholics will revert to the system in operation previous to the Manitoba Act, and will establish, support, and maintain schools in accordance with their principles and faith as aforementioned.

"9. Protestants are satisfied with the system of education provided for by the said Act, the Public Schools Act, and are perfectly willing to send their children to the schools established and provided for by the said Act. Such schools are, in fact, similar in all respects to the schools maintained by the Protestants under the legislation in force immediately prior to the passage of the said Act. The main and fundamental difference between Protestants and Catholics, with reference to education, is that while many Protestants would like education to be of a more distinctly religious character than that provided for by the said Act, yet they are content with that which is so provided, and have no conscientious scruples against such a system; the Catholics, on the other hand, insist and have always insisted upon education being thoroughly permeated with religion and religious aspects. That causes and effects in science, history, philosophy, and aught else should be constantly attributed to the Deity, and not taught merely as causes and effects.

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"10. The effect of the Public Schools Act will be to establish public schools in every part of Manitoba where the population is sufficient for the purpose of a school, and to supply in this manner education to children free of charge to them or their parents further than their share, in common with other members of the community of the amounts levied under and by virtue of the provisions contained in the Act.

"11. In case Roman Catholics revert to the system in operation previous to the Manitoba Act, they will be brought in direct competition with the said public schools; owing to the fact that the public schools will be maintained at public expense and the Roman Catholic schools by school fees and private subscription, the latter will labour under serious disadvantage. They will be unable to afford inducements and benefits to children to attend such schools [413] equal to those afforded by public schools, although they would be perfectly able to compete with any or all schools unaided by law-enforced support."

John Sutherland and Alexander Polson, in two affidavits produced by the respondent in answer to the petition of the appellant, say also as to the state of the schools in the Province before the union :—

"2. That schools which existed prior to the Province of Manitoba entering confederation were purely private schools, and were not in any way subject to public control, nor did they in any way receive public support.

"3. No school taxes were collected by any authority prior to the Province of Manitoba entering confederation, and there were no means by which any person could be forced by law to support any of said private schools. I think the only public revenue of any kind then collected was the customs duty, usually four per cent."

It appears clearly as a fact from these affidavits, which constitute the only proof on the record, that before the union the Catholics of the territory enjoyed by practice not only the privilege of having their schools but also negatively as a corollary to and essential part of this privilege freedom from contributing to any system of education. In fact it was the not being obliged to contribute to any other schools than their own which constituted for them in truth a privilege. The privilege alone of having their own schools would have been illusory, or rather could not have been called a privilege. To have voluntary schools is of common right, it is not a privilege and a custom which made them support both their own and those of others would have been for them a singular privilege. The privi-



lege in short would have belonged to others. This, however, it seems to me, is the only privilege which the respondent in the present case would now concede to the Catholic minority in the Province.

The law of 1890, says the respondent, does, it is true, oblige [414] Catholics to contribute to free schools, but it does not oblige them to send their children to them. It does not forbid them either from having separate schools; it does not then prejudice in any way any of the rights and privileges conferred on them by custom before the union, consequently it is *intra vires*. I think this reasoning altogether erroneous. In fact I should have been disposed not to believe it serious if it had not received the sanction of the provincial tribunal. To what in effect does it amount? To cause to be said by the non-Catholic majority to the Catholic minority: "you have the privilege of having your schools; we leave it to you provided you help us to support ours. You cannot send your children to our schools, but we do not oblige you to do so all that we demand of you is to pay for instructing ours." I seek in vain in the record proof that this was the custom before the union. I find there quite the opposite.

Is it possible moreover to imagine a system like that which the respondent would wish to enforce in Manitoba, and at the same time to recognise the right of the minority to separate schools, a right which the respondent could not deny in face of sect. 22 of the constitutional Act of 1870? It is plain that the legislator foreseeing that in the future one or other of the two classes, Protestant or Catholic must of necessity prevail by number in the projected Province makes by this section an enactment for both cases. They were then almost equally divided, to judge by the first legislation of the new Province on the subject in 1871, when it appears that the board of education was composed equally of Catholics and of Protestants with a superintendent for each of these two classes and with an equal division of the government grant. In that state of things Parliament by sect. 22 of the Act provides for both of these [415] results. The first sub-section which I have cited at length assures to the minority, whether Catholic or Protestant, the rights up to that time conferred on them by practice, and the second sub-section gives them the right of appeal to the Governor-General in Council from all legislation affecting any of their rights in the matter. Had the Protestant population happened to be in the minority they could not have been compelled to contribute to the support of Catholic schools. They would have claimed the same right to their own schools as their co-religionists enjoy in the Pro

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vince of Quebec complete and unfettered, that is to say, free from taxation for Catholic schools. To-day the Catholics forming the minority claim only the same right and the free exercise of that right. I am of opinion that their claim is well founded. They have a right to their system of schools such as their co-religionists enjoy in Ontario or on the same principle. It is with this object, and with this object alone, at least I am unable to view the matter otherwise, that this special provision relative to separate schools taken from the British North America Act was inserted in the constitutional Act of 1870 with the addition of the words "or by practice,"—words rendered necessary as I have said, to fully express the intention of the legislator, and to accomplish his purpose, owing to the well known fact that there did not then exist on the subject in these regions any law, and that the whole matter was there governed by practice and by practice alone.

The respondent corporation and the Attorney-General while recognising the abstract right of the minority to their own schools would like to impede its free exercise. By the statute in question in effect all the government grant for education is appropriated to the public schools or free schools ; any apportionment to the schools of the minority is refused, sect. 108. This grant, however, is taken [416] from the public revenue to which the minority has duly contributed its share. And this is all that his Eminence the Archbishop of St. Boniface complains of in paragraph 11 of his affidavit which has been partially misinterpreted. His Eminence does not fear for the Catholic schools the competition of the public schools if the legislature is willing to place both on an equality before the law. What his Eminence says is that in maintaining the public schools at the cost of the State, while leaving the Catholic schools to the mercy of voluntary contributions, the latter will be placed in a most unfavourable position. And as it seems to me no arguments are necessary to prove this. But not only I repeat does the statute in question give to the public schools alone the whole of the provincial grant but it subjects the Catholics to direct taxation for their support. And, in addition, not only the private property of each taxable Catholic but every Catholic school building and all properties appropriated by Catholics for the education of their children are taxable for the support of free schools.

The statute by sect. 179 amounts even to confiscation of the school property of the Catholic minority in certain cases for the benefit of the free schools.

I am of opinion that this legislation prejudicially affects the rights and privileges enjoyed by this minority before the union and is consequently ultra vires.

The respondent has sought to find an answer to the appellant's petition in the following argument:—"It is possible," he says, "that this legislation may prejudicially affect the rights of the minority, and yet in spite of that it comes within the powers of the Manitoba Legislature, as for example, a municipal or other tax may indirectly more or less deprive Catholics of the funds necessary for [417] the support of their schools, yet it is necessary for them, notwithstanding, to submit thereto." This reasoning, it seems to me, is destitute of foundation. Moreover it is in its laws in respect of education that the legislature is not able, under sect. 22 of the Federal Act of 1870, to prejudicially affect the right of the minority. There is no question as to laws on any other subject. Then in the case of a municipal tax, the minority is on a footing of perfect equality with the majority and receives in like manner the equivalent of what it contributes by participating like it in the benefits of that tax; while here the appellant claims that he is injured because he is compelled to pay for others and to contribute to the support of schools from which he will never benefit: this is all that he complains of. He is left certainly in theory his system of schools, but the exercise of his right is fettered. Nothing is left of it but the shadow. If the State imposes on this minority either \$20,000 or any other amount whatever for the support of free schools this is, as seems plain to me, so much of which the minority is deprived for the support of its own schools. Now, to fetter the exercise of a right, to obstruct or injure it is, as it seems to me, to prejudicially affect this right. And this is what in no doubtful terms the Legislature of Manitoba has no power to do under the Act from which alone it derives its powers.

I am of opinion that the appeal should be allowed.

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Patterson, J.

PATTERSON, J. :—

The statute of Canada which gave its constitution to the Province of Manitoba (1) declares, in sect. 22, that in and for the Province of Manitoba the Legislature “may exclusively make laws in relation to education, subject and according to the following provision :—

“Nothing in any such law shall prejudicially affect any right or [418] privilege with respect to denominational schools which any class of persons have by law or practice at the union.”

“Law” here evidently means statute law. The basis of the constitution given to the new Province (2) was the British North America Act, 1867. It is declared that that Act shall apply to the Province excepting, amongst other things, such provisions as are varied by the Manitoba Act.

Sect. 93 of the British North America Act, which dealt with the subject of provincial legislation respecting education, was not intended to be applied to Manitoba without some variations. It was therefore rewritten to form sect. 22 of the Manitoba Act, the original language being adhered to wherever no variation of the provisions was intended. In this way I suppose it was that sect. 22 happens to refer to rights and privileges with respect to denominational schools which any class of persons had in the Province by law, when there was no statute touching such schools that affected Manitoba. The reference in sect. 93 was to statutory rights and privileges existing in some of the Provinces entering into confederation. In sect. 22 it meant nothing. If that section, which is a transcript of sect. 93 with the interpolation of the words “or practice,” had not introduced those words it would have been inoperative for want of something to operate on. It is not an example of very precise or accurate drafting. The first question for us to decide is what the added words “or practice” mean, or whether they also mean nothing.

“Which any class of persons have by law or practice”—in grammatical effect “have by law or by practice.”

What is meant by having by practice?

[419] To have by law here means to have under some statutory provision, the preposition “by” pointing to the law or statute as the means or instrument by which the right or privilege was acquired. Are we obliged to understand the term “by practice” as intended to signify acquired by practice or user, involving some idea of prescription? It is arguable, and has in effect been argued,

(1) 33 Vict. c. 3.

(2) 33 Vict. c. 3, s. 2.

that that is the proper understanding of the term, that the word "by" must have the same force when understood in the one place as when expressed in the other, leading to the conclusion that, inasmuch as no rights or privileges in respect of denominational schools had been acquired in the territory in that manner, the clause in question is wholly inoperative.

The construction thus contended for may be capable of being supported by strict reasoning from rules of grammar or rhetoric, but it is not, in my judgment, appropriate to this clause. We have seen that precision and accuracy are not characteristics of the clause as a whole, and we cannot properly single out these particular words "by practice" for very critical and pedantic treatment.

We must credit the Legislature with having intended that these words, which were added to those taken from sect. 93, should have some effect. I take the meaning of the clause to be that rights and privileges in respect of denominational schools existing by statute, if any such there had been, and rights actually exercised in practice at the time of the union, were not to be prejudicially affected by provincial legislation.

There were denominational schools maintained by different classes of persons, some by the Roman Catholic Church, others by Protestants. The right to establish and maintain such schools was not derived from statutory law. It was incident to the freedom [420] of British subjects, and was independent of and anterior to legislation. The Manitoba Act did not assume to preserve that right merely as an abstract and theoretical right, but it did so in favour of such classes of persons as at the union were practically exercising it.

If this construction seems to do any violence to the language of the clause, it is only by treating the word "by" where it is understood before the word "practice," as not having precisely the same force as when expressed before the word law. But, as once remarked by one of the most eminent of English judges, Lord Stowell, when Sir W. Scott—"The Court is not bound to a strictness at once harsh and pedantic in the application of statutes" (1).

Dicta to the same effect, as well as examples of their application, abound in the books. Thus in a recent case, *Salmon v. Duncombe* (2), we find it laid down in the judgment of the Judicial Committee that when the main object and intention of the statute are clear, it must not be reduced to a nullity by the draftsman's unskilfulness or ignorance of law, except in the case of necessity or the absolute intractability of the language used.

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(1) *The Reward*, 2 Dods. Adm. Rep. 265, 269. (2) 11 App. Cas. 627.



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“The more literal construction of a section of a statute,” said Lord Selborne in *Caledonian Railway Company v. North British Railway Company* (1), “ought not to prevail if it is opposed to the intentions of the Legislature as apparent by the statute; and if the words are sufficiently flexible to admit of some other construction by which that intention will be better effectuated.”

In my opinion the Roman Catholics are a class of persons who had, within the meaning of the statute, rights and privileges with respect to denominational schools in the Province of Manitoba at the union.

The rights and privileges preserved by the statute were only those peculiar to schools as denominational schools, or which gave the schools that character. Chiefly they were the education of their [421] children under the control and direction of the Church, and the maintenance of their schools for that purpose.

A point is made in the affidavit on which these proceedings are founded upon the fact that the schools of the Roman Catholic Church were maintained by the Catholics by contributions in some form, as fees for tuition or as contributions to the general funds of the Church, or possibly, though we are not told that it was so, as subscriptions for school purposes, and the schools of the Protestants were maintained by Protestants, neither body contributing or being liable to contribute to maintain the schools of the other. The fact is not without importance from a point of view which I shall presently notice, but I am not prepared to hold that the immunity enjoyed from liability to support schools of another denomination, at a time when taxation for school purposes was unknown in the territory, was a privilege in respect of denominational schools. The Provincial statute of 1890 which is attacked as ultra vires renders every taxpayer liable to assessment for the support of the public schools. These schools are not denominational, and they are objectionable to the Roman Catholic Church, which insists upon the supervision of the education of its children. The effect of the new statute and the grounds of objection to it are explained in the affidavit of Archbishop Tache. I refer particularly to paragraphs 8, 10, and 11. Rather than countenance the public schools, he tells us in the 8th paragraph Roman Catholics will revert to the system in operation previous to the Manitoba Act, and will establish, support, and maintain schools in accordance with their principles and faith. In other words, they will assert and act upon the privilege or right in respect of denominational schools, which, as I construe sect. 22, they had as a class at the union.



[422] It is thus in effect asserted on the part of the applicant that the right or privilege has not been destroyed by the Public Schools Act of 1890. The same assertion is made on the part of the respondents, who make it one of their grounds in support of the by-laws which are attacked, or rather in support of the Provincial statute.

But the right or privilege may continue to exist and yet be injuriously affected. It is not the cancelling or annulling of the right that is forbidden. The question is : Does the statute of 1890 injuriously affect the right? That it does so appears to me free from serious doubt. In one form or another the members of the Church supported the schools of the Church. As a class of people they bore the burden. We are not concerned to inquire how the burden was distributed among the individual members or whether each one bore some part of it. The privilege in question appertained to the class of people and the burden was borne by the class. The bearing of the burden was essential to the enjoyment of the privilege. It is the maintenance of a school that is of value to the community or class, rather than the abstract or theoretical right to maintain it. In other words the value of the right depends upon the practical use that can be made of it. Whatever throws an obstacle in the way of that practical use prejudicially affects the right. It is not conceivable that in any community, and notably among the settlers in a region like Manitoba, a burden of taxation for the support of public schools can be imposed on the people of any religious denomination without rendering it less easy for the same people to maintain denominational schools. The degree of interference is immaterial. If it occurs to any extent the right to maintain the denominational school is injuriously affected.

It has been objected that the argument against the public school [423] tax on the ground of its making the people less able to support their denominational schools involves the denial of the right to impose ordinary municipal taxes, because those taxes also absorb their share of the means of the taxpayers. The objection is aside from the issue. The provision of the statute relates only to legislation respecting education, and the restriction is upon the power to make laws on that subject. It is not, however, merely a question of pecuniary ability to do one's share in supporting a denominational school in addition to paying the public school tax. Assuming the ability in the case of every individual belonging to the denomination, which is an extravagant assumption, we must remember that one payment is compulsory and the other voluntary. When a man has under compulsion paid his money for the support of the public

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school it is natural that he should be less willing to avail himself of the privilege of paying for the support of the other, though his right to pay as well as his ability remain. The contest is over the right or privilege, not of the individual but of the class of persons.

We are familiar with the expression "injuriously affected" as used in the compensation clauses of the Railway Acts and in the English Lands Clauses Act. It would be labour lost to cite cases turning upon the application of the provisions for compensating persons whose lands are injuriously affected by works done under sanction of law. They are very numerous, and the English cases will be found collected in Cripps on Compensation (1), and several other treatises. The claim to compensation failed in many of the cases in which lands were injuriously affected for reasons arising on the statutes under which the claim was made, as *e.g.*, because the injury was caused by an act that would not have given a right of action at [424] common law, or because it was caused by the operation only and not by the construction of the work; but all the cases agree in recognising as something that injuriously affects a man's property whatever interferes with his convenience in the enjoyment of it or of any right in respect of it, or prevents him from enjoying it to the best advantage, and whether the injury happens to be permanent or only temporary. The same principle makes it imperative to hold that the right of a class of persons with respect to denominational schools is injuriously affected if the effect of a law passed on the subject of education is to render it more difficult or less convenient to exercise the right to the best advantage. I mean the direct effect of the law, and I regard the prejudice to the denominational schools which is worked by making those to whom it looks for support pay the school tax as a direct effect of the statute. There may be indirect results by which the denominational school may suffer in its prestige or prosperity, yet which cannot be taken to bring the statute under censure of sect. 22. One of these, viz., the competition of the public schools, is alluded to in the eleventh paragraph of his Grace the Archbishop's affidavit. I am not quite sure that I fully understand that paragraph. I am not sure whether the objection it indicates extends to the establishment of any schools at the public expense, or only to the assessment of Roman Catholics for the support of public schools. I shall therefore merely say that, according to my present opinion, a public school may, by reason of superior equipment or of other advantages, compete with a denominational school to the disadvantage of the latter without thereby affording just cause for complaint.

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(1) 2nd ed. c. 9.



Upon the grounds which I have thus discussed, I am of opinion that the Act of 1890 transgresses the limits of the power given by [425] sect. 22 of the Manitoba Act, and that the assessment which the appellant is resisting is illegal.

It may not be out of place to remark, though it is scarcely necessary to do so, that there is no general prohibition of legislation which shall affect denominational schools. The prohibition relates only to the rights and privileges of classes of persons, and to legislation which injuriously affects such rights. There is, therefore, room for legislative regulation on many subjects as, for example, compulsory attendance of scholars, the sanitary condition of school houses, the imposition and collection of rates for the support of denominational schools, and sundry other matters which may be dealt with without interfering with the denominational characteristics of the school, and which, I suppose, were dealt with in the statutes of the Province that were repealed in 1890 to make way for the system now complained of.

I am of the opinion that the appeal should be allowed and the by-laws of the city of Winnipeg, Nos. 480 and 483, quashed, the appellant having his costs of the appeal and also of all proceedings in the Courts below.

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#### JUDGMENTS IN MANITOBA COURT OF QUEEN'S BENCH.

[*Reported 7 Manitoba Rep. 273.*]

TAYLOR, C. J. :—

The application to quash these by-laws raises the important question, whether the Public Schools Act, 53 Vict., c. 38 (M., 1890), is one within the power of the Legislature of this Province to pass. It came in the first instance before my brother Killam, who, in a considered judgment upheld the validity of the Act, and dismissed the summons. From his decision an appeal was taken, which has now to be disposed of.

The by-law No. 480, dated 14th July, 1890, provides for levying by assessment the amount required for the municipal and school purposes of the city of Winnipeg for the current municipal year 1890. By-law No. 483, dated 28th July 1890, amends the former by-law in several respects. Under these two by-laws a rate of 2 cents on the dollar is to be raised, levied and collected on the whole assessed value of the real and personal property in the city of Winnipeg, the proportion required for school purposes being 4 1-5th mills on the dollar.

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The only ground specifically stated in the original summons as that on which it is sought to quash these by-laws is, "Because by the said by-laws the amounts to be levied for school purposes for the Protestant and Catholic schools are united, and one rate levied upon Protestants and Roman Catholics alike for the whole sum." There is no question raised that the assessment in the manner provided for by these by-laws is not in accordance with the provisions of the Public Schools Act.

It is claimed that the school law in force in the Province before the passing of that Act, and which it professes to repeal, is still in force. Under that earlier law there was one board of education, which for certain purposes acted as a united board, but which was also divided into two sections, a Protestant section consisting of all the Protestant members, and a Roman Catholic section consisting of the Roman Catholic members. The school districts throughout the Province were divided into Protestant and Catholic. The Protestant schools were under the control of the Protestant section of the board, and the trustees of these schools were elected by the Protestant ratepayers. The Roman Catholic section of the board [310] had in like manner entire control of the Catholic schools, and the Catholic ratepayers elected the trustees. There was also one superintendent of education for the Protestant schools, and another for the Catholic schools. The law also provided for levying the taxes for the support of schools in Protestant school districts upon the property of Protestants alone, and in Roman Catholic school districts upon Roman Catholics only. Provision was also made for apportioning taxes derived from the property of corporations, or of persons who could not be considered to belong to either body. The grant made annually by the legislature for educational purposes was apportioned between the two sections of the board, for distribution among the schools under the charge of each respectively.

The objection to the Public Schools Act is, that it is not one within the power of the Provincial Legislature to pass, having regard to the limitations upon their power of legislating on the subject of education, imposed by sect. 22 of the Manitoba Act, 33 Vict. c. 3 (D., 1870).

That section is as follows :—"In and for the Province the said Legislature may exclusively make laws in relation to education subject and according to the following provisions :—(1) Nothing in any such law shall prejudicially affect any right or privilege with respect to denominational schools which any class of persons have by law or practice in the Province at the union ; (2) An appeal

shall lie to the Governor-General in Council from any act or decision of the Legislature of the Province, or of any provincial authority, affecting any right or privilege of the Protestant or Roman Catholic minority of the Queen's subjects in relation to education ; (3) In case any such provincial law, as from time to time seems to the Governor-General in Council requisite for the due execution of the provisions of this section, is not made, or in case any decision of the Governor-General in Council, on any appeal under this section is not duly executed by the proper provincial authority in that behalf, then, and in every such case, and as far only as the circumstances of each case require, the Parliament of Canada may make remedial laws for the due execution of the provisions of this section and of any decision of the Governor-General in Council under this section."

A section similar in character is found in the British North America Act, as sect. 93. There are differences between the two sections, and when Parliament, in the Manitoba Act, used different language, it must be assumed that there was some definite intention in doing so. The differences between the two sections are the following:—Sub-sect. 1 of sect. 93 speaks of any right or privilege as to denominational schools which "any class of persons have by law in the Province at the union," while in sub-sect. 1 of sect. 22, the right or privilege is spoken of as that which "any class of persons have by law or practice." Sect. 93 has, as sub-sect. 2, a clause relating solely to the Provinces of Ontario and Quebec, which does not appear in sect. 22. In sub-sect. 3 of sect. 93 the words, "Where in any Province a system of separate or dissentient schools exists by law at the union, or is thereafter established by the Legislature of the Province," are found immediately before what appears in sect. 22 as sub-sect. 4. Then sub-sect. 3 of sect. 93 provides for an appeal to the Governor-General in Council only from any act or decision of any provincial authority, while sub-sect. 2 of sect. 22 says that an appeal shall lie "from any act or decision of the Legislature of the Province, or of any provincial authority." Sub-sect. 4, of sect. 93, is the same as sub-sect. 3 of sect. 22, there being no change in the language.

Possibly there is no practical difference in the effect of the changed language in sub-sect. 2, as to an appeal from an act or decision of the legislature as well as from an act or decision of any provincial authority. At all events in *Separate School Trustees of Belleville v. Grainger* (1), Blake, V.C., seems to have been of opin-

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ion that, "act of any provincial authority" used in sect. 93 would include an Act of the Provincial Legislature.

[312] It is under sect. 22 of the Manitoba Act that the question raised in the present case must be considered, and the decision of it must be governed by the provisions of that section. By sect. 2 of the Manitoba Act the provisions of the British North America Act are made applicable to the Province of Manitoba, "except those parts thereof which are in terms made, or by reasonable intendment may be held to be, specially applicable to, or to affect only one or more, but not the whole of the Provinces now comprising the Dominion, and except so far as the same may be varied by this Act." As sect. 93 does not profess to settle the question of education, and of separate or denominational schools for the whole Dominion, but only for the Provinces of Ontario and Quebec, and the question of education in the newly-formed Province of Manitoba is dealt with specially and in somewhat varied language, there can be no doubt that sect. 93 is not the one which must govern the decision in this case. As, however, sect. 22 was undoubtedly based on sect. 93, the terms of the latter are material, but only in so far as they may afford assistance in arriving at the true construction to be placed on the section of the Manitoba Act.

It was argued that when considering the meaning and intent of sect. 22, and applying its language, regard must be had to the condition of things existing in Upper Canada as to separate schools before confederation, and which led to sect. 93 finding a place in the British North America Act. It is said that in construing an Act its history must be considered, and that statutes in *pari materiâ* must be construed together, the construction of one applied to the other. Now, there is no doubt that the history of an Act may be inquired into and considered by the Court, where difficulty is found in construing it. The Court must look not only at the words of the statute but to the cause of making it, to ascertain the intent: *The King v. East Teignmouth* (1). Or, as it was expressed by Sir [313] George Jessel in *Holme v. Guy* (2), "The Court is not to be oblivious . . . of the history of law and legislation. Although the Court is not at liberty to construe an Act of Parliament by the motives which influenced the legislature, yet when the history of law and legislation tells the Court, and prior judgments tell this present Court, what the object of the legislature was, the Court is to see whether the terms of the section are such as fairly to carry out that object and no other, and to read the section with

(1) B. &amp; Ad. 244, 249.

(2) 5 Ch. D. 901, 905.



a view of finding out what it means, and not with a view to extending it to something that was not intended." As Bramwell, B., said in *Attorney-General v. Sillem* (1), "so perhaps history may be referred to, to shew what facts existed, bringing about a statute, and what matters influenced men's minds when it was made."

Previous statutes, in *pari materiâ*, may and ought to be looked at; when there are earlier Acts relating to the same subject, the survey must extend to them, for all are for the purposes of construction considered as forming one homogeneous and consistent body of law, and each of them may explain and elucidate every other part of the common system to which it belongs: *Rex v. Loxdale* (2); *Duck v. Addington* (3); *Moseley v. Stonehouse* (4).

In many cases the courts have taken great liberties with the wording of statutes in order to effect what they believed to be the intention of Parliament. In *Caledonian Railway Company v. North British Railway Company* (5), Lord Selborne said, "The more literal construction ought not to prevail if . . . it is opposed to the intentions of the legislature as apparent by the statute; and if the words are sufficiently flexible to admit of some other construction by which that intention will be better effectuated." And the Court of Appeal held, in *Ex parte Walton* (6), that "a statute may be construed contrary to its literal meaning, when a literal construction would result in an absurdity or inconsistency, [314] and the words are susceptible of another construction which will carry out the manifest intention."

All this was old law and was stated more than three hundred years ago in *Stradling v. Morgan* (7). "The Judges of the law in all times past have so far pursued the intent of the makers of statutes that they have expounded Acts which were general in words to be but particular where the intent was particular." Then, after referring to several cases, the report proceeds, "From which cases it appears that the sages of the law heretofore have construed statutes quite contrary to the letter in some appearance, and those statutes which comprehend all things in the letter, they have expounded to extend but to some things, and those which generally prohibit all people from doing such an act, they have interpreted to permit some people to do it, and those which include every person in the letter they have adjudged to reach some persons only, which expositions have always been founded upon the intent of the legislature, which

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(1) 2 H. & C. 531.

(2) 1 Burr. 445.

(3) 4 T. R. 447.

(4) 7 East 174.

(5) 6 App. Cas. 114, 122.

(6) 17 Ch. D. 746.

(7) Plowd. 199, 204, 205.

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they have collected sometimes by considering the cause and necessity of making the Act, sometimes by comparing one part of the Act with another, and sometimes by foreign circumstances. So that they have ever been guided by the intent of the legislature which they have always taken according to the necessity of the matter, and according to that which is consonant to reason and good discretion."

The eminent American jurist, Chancellor Kent, has said in his Commentaries at p. 462, "The reason and intention of the lawgiver will control the strict letter of the law, when the letter would lead to palpable injustice, contradiction and absurdity." The intention of the Legislature is what ought to govern, and the object of the Court must always be to ascertain what that intention is.

But after all, how is the intention of the Legislature, the true meaning of a statute, to be ascertained? The eminent jurist whose words have just been quoted says: "The true meaning of the statute is generally and properly to be sought from the body of the Act itself." These extraneous helps in construing a statute seem [315] resorted to when there is something doubtful in the wording of it; where the words are susceptible of more than one meaning, or where the language used is such as to raise difficulties in its grammatical construction. Thus in *Hollingworth v. Palmer* (1), Parke, B., dealing with a particular section of an Act, said, "This section is certainly most incorrectly worded, and it is, therefore, necessary to modify its language in order to give it a reasonable construction. The rule we have always followed of late years is to construe statutes, like all other written instruments, according to the ordinary grammatical sense of the words used, and, if they appear contrary to or irreconcilable with the expressed intention of the legislature, or involve any absurdity or inconsistency in their provisions, they must be modified so as to obviate that inconvenience, but no further." And Bramwell, B., when using the language already quoted in *Attorney-General v. Sillem* (2), was speaking of statutes of doubtful meaning, for he said, "In this, as in other cases of doubtful meaning, it is legitimate to resolve that doubt by ascertaining the general scope and object of the enactment . . . . It may be a legitimate mode of determining the meaning of a doubtful document to place those who have to expound it in the situation of those who made it." So Lord Wensleydale said in *Philpott v. St. George's Hospital* (3), "We ought to look to the words of the statute, and to give those words their natural and ordinary mean-

1 4 Ex. 267, 281.

(2) 2 H. & C. 431, 530, 531.

(3) 6 H. L. C. 338, 366.



ing." The proper mode of construing an important statute was considered by all the common law judges of England when called in to advise the House of Lords in *The Sussex Peerage Case* (1). Their unanimous opinion was delivered by C. J. Tindal. "The only rule for the construction of Acts of Parliament is, that they should be construed according to the intent of the Parliament which passed the Act. If the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. The [316] words themselves alone do, in such case, best declare the intention of the lawgiver. But if any doubt arises from the terms employed by the legislature, it has always been held a safe means of collecting the intention to call in aid the ground or cause of making the statute, and to have recourse to the preamble which, according to Chief Justice Dyer, is a key to open the minds of the makers of the Act and the mischiefs which they intended to redress."

I have spoken of how the intention and meaning of the legislature is to be ascertained, but the question for an interpreter of a statute is not, properly, what the legislature meant but what its language means: *Palmer v. Thatcher* (2). Or, as the present Lord Chief Justice of England said, his course always is to suppose that parliament meant, what parliament has clearly said, and not to limit plain words in an Act of Parliament by considerations of policy: *Coxhead v. Mullis* (3).

In the present case I do not see what assistance in answering the questions which arise here is to be got from an inquiry into the history of sect. 93 of the British North America Act, or of the corresponding clause in the Manitoba Act. Before confederation there were in Ontario separate or dissentient schools in existence under an Act of the Parliament of Canada. The legislature which established these schools could at any time have put an end to them, and there can be no doubt the statesmen who framed the scheme of confederation intended by the provision in the British North America Act to secure that the Provincial Legislature, the body thereafter to deal with educational matters in Ontario, should not change the then existing state of things, but that it should be for ever continued. They also provided that all the powers, privileges and duties which were then conferred and imposed by law in Upper Canada on the separate schools and school trustees of Roman Catholics should be extended to the dissentient schools of Protestants or Roman Catholics in Quebec. No provision was made

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(1) 11 Cl. & F. 85, 143.

(2) 3 Q. B. D. 346, 353.

(3) 3 C. P. D. 439, 442.



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for the Provinces of Nova Scotia and New Brunswick in which at that time no separate schools existed by law. It cannot, therefore, [317] be said that by this sect. 93 it was intended to settle for ever the question of separate schools in the Dominion, for, if so, why was all mention of these two provinces omitted?

The argument was pressed that, by sect. 22 of the Manitoba Act, Parliament, in view of the controversy over separate schools in Ontario, could only have intended to secure for the Roman Catholics of Manitoba the same rights and privileges as to separate schools which were by the British North America Act secured for Ontario and Quebec. I cannot, however, see that Parliament intended more than is expressed by the language used. It must be assumed that when the Act came to be passed Parliament knew there were not at that time in the territory being organised as the Province of Manitoba any separate or denominational schools existing by law. The Act therefore says that, rights or privileges with respect to denominational schools which any class of persons had by law or practice, should not be prejudicially affected by future provincial legislation. The intention of Parliament is plain, no future provincial legislation is to prejudicially affect any right or privilege as to denominational schools, if any such right or privilege exists, and whatever it may be. What the Parliament intended is not at all doubtful, although, perhaps, it is not so easy to say what exact meaning should be attached to the language used. Surely, had it been intended to secure to Roman Catholics, or to any other class of persons in Manitoba, the same right of having separate schools, as is provided for in the Province of Ontario, Parliament would have said so. Parliament had before it the express provisions of the British North America Act on this subject, and would, I think, most certainly have followed that Act had the intention been to settle the matter as that Act settled it for Ontario and Quebec. The inference which it seems to me should be drawn from the altered form of the section rather is, that Parliament intended that as the people of the older Provinces had settled this question for themselves, so it should be left for the people of the Province, [318] then being formed, to settle it for themselves. While so leaving it Parliament naturally inserted a provision to secure that existing rights and privileges, whatever these might be, should not be disturbed by the settlement they might make.

What the Court has to deal with is, did any such right or privilege exist, and, if so, has such right or privilege been prejudicially affected by the Public Schools Act?

The parts of sect. 22, which are of importance, are the section and first sub-section:—"In and for the Province the said Legislature may exclusively makes laws in relation to education, subject and according to the following provisions : (1) Nothing in any such law shall prejudicially affect any right or privilege with respect to denominational schools which any class of persons have by law or practice in the Province at the union."

It may be remarked here that when the Court in New Brunswick dealt in *Ex parte Renaud* (1), with the same words in sect. 93 of the British North America Act, they held that they were not intended to distinguish between Protestants and Roman Catholics. It was held in the judgment delivered by the learned Chief Justice, now Chief Justice of the Supreme Court of Canada, that sub-sect. 1 meant just what it expresses, that "any," that is, every "class of persons" having any right or privilege with respect to denominational schools, whether such class should be one of the numerous denominations of Protestants or Roman Catholics, should be protected in such rights. As the judgment of the Court in New Brunswick was affirmed on appeal by the Judicial Committee of the Privy Council, approving of the reasons given in the Court below, it must be assumed that this was regarded by the ultimate Court of Appeal as the true construction of the sub-section.

Are then the members of the Roman Catholic Church in Manitoba a class of persons who had at the time of the union, by law or practice, any right or privilege with respect to denominational [319] schools? And if so, does the Public Schools Act prejudicially affect any such right or privilege?

Happily there is no dispute as to the facts, as to the state of affairs with reference to education, existing at the time of the union, and upon which the claim to possess certain rights and privileges is based.

In an affidavit made by the Archbishop of St. Boniface, and filed in support of the application, his Grace says that, prior to the passing of the Manitoba Act, "There existed in the territory now constituting the Province of Manitoba a number of effective schools for children ; (3) These schools were denominational schools, some of them being regulated and controlled by the Roman Catholic Church, others by various Protestant denominations ; (4) The means necessary for the support of the Roman Catholic schools were supplied to some extent by school fees paid by some of the parents of the children who attended the schools, and the rest was paid out

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(1) 1 Pugsley, 273 ; *ante*, vol. 2, p. 445.



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of the funds of the Church contributed by its members ; (5) During the period referred to Roman Catholics had no interest in or control over the schools of the Protestant denominations, and the members of the Protestant denominations had no interest in or control over the schools of Roman Catholics. There were no public schools in the sense of State schools. The members of the Roman Catholic Church supported the schools of their own Church for the benefit of Roman Catholic children, and were not under obligation to, and did not contribute to the support of any other schools ; (6) In the matter of education, therefore, during the period referred to, Roman Catholics were, as a matter of custom and practice, separate from the rest of the community, and their schools were all conducted according to the distinctive views and beliefs of Roman Catholics as herein set forth." In answer to the application two affidavits were filed made by Alexander Polson and John Sutherland, residents of the Province for 50 years, and these are in no way inconsistent with the affidavit of his Grace the Archbishop. In each of them it is [320] stated, "That schools which existed prior to the Province of Manitoba entering confederation were purely private schools, and were not in any way subject to public control, nor did they in any way receive public support. No school taxes were collected by any authority prior to the Province of Manitoba entering confederation, and there were no means by which any person could be forced by law to support any of said private schools. I think the only public revenue of any kind then collected was the customs duty, usually four per cent."

Had Roman Catholics, as a class of persons, what can be considered or called rights and privileges within the ordinary meaning of these words as used in the Act? There were schools established and carried on, the expense of which was defrayed by Roman Catholics. Episcopalians and Presbyterians had the same right, and also carried on and defrayed the expense of schools. Every other Protestant denomination had the same right, and so had every private individual. Any man could establish and carry on a school at his own expense if he chose to do so.

It seems to me the utmost the Roman Catholics can be said to have had was what may be called a moral right. Had the words "right or privilege" stood alone in the Act it could not, I think, be said they had any which is prejudicially affected by the Public Schools Act.

"A right" is in the Imperial Dictionary defined to be "a just claim, or that to which one has a just claim ; that which may be lawfully claimed of any other person. . . . In law that which



the law directs, a liberty of doing or possessing something consistently with law." In Bouvier's Law Dictionary it is said to be "the correlative of duty, for whenever one has a right due to him some other must owe him a duty." And in Browne's Law Dictionary it is said to be "a lawful title or claim to anything." Wharton's Law Lexicon defines "right" as "a liberty of doing or possessing something consistently with law."

In the Imperial Dictionary "privilege" is defined as "a right, immunity, benefit, or advantage enjoyed by a person or body of [321] persons beyond the common advantages of other individuals, the enjoyment of some desirable right, or an exemption from some evil or burden; a private or personal favour enjoyed; a peculiar advantage." It is defined by Webster as "a right or immunity not enjoyed by others or by all." In Bacon's Abr., vol. 8, p. 158, privilege is said to be "An exemption from some duty, burden, or attendance with which certain persons are indulged. . . . A particular disposition of the law which grants special prerogatives to some persons contrary to common right." Comyn's Dig. says, "Privilegium est jus singulare, seu lex privata, quæ uni homini vel loco conceditur." So, in Mackeldy's Roman Law, sect. 189, it is said: "Privilege in its general sense denotes every peculiar right or favour granted by the law contrary to the common rule," and in sect. 190, "the privileged party may exercise it to its full extent and nobody is allowed to disturb him in doing so; hence he has a right to prohibit any other person who is not in the enjoyment of a similar privilege from assuming the same right."

In *Campbell v. Spottiswoode* (1), the Court had before it a case of newspaper libel, which it was claimed for the defence was a privileged communication. Crompton, J., dealing with this, spoke of what is a privileged communication in this way, "That is where, from the particular circumstances or position in which a person is placed, there is a legal or social duty in the nature of a private or peculiar right as opposed to the rights possessed by the community at large." And Blackburn, J., said, "The meaning of the word is, that a person stands in such a relation to the facts of the case that he is justified in saying or writing what would be slanderous or libellous in any one else."

It seems then that rights and privileges, as used in the statute, must mean something special and peculiar, something not common to all the community. To be protected they must be such as the class of persons seeking protection had, apart from the rest of the

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community, must be such as they possessed and others did not. [322] That is the construction put upon the words by the Court of Queen's Bench in England in *Fearon v. Mitchell* (1). Mitchell put up a building on plans submitted to and approved by the local board, in which for a number of years he carried on an extensive business selling cattle and sheep by auction. The board then set up a public market in the town and laid an information against him to recover a penalty for selling at his own place, and not in the public market, articles on which a toll was by the Act authorized to be levied. The justices stated a case for the opinion of the Court. On the argument one ground of defence relied on was a proviso in the Act, "No market shall be established in pursuance of this section so as to interfere with any rights, powers or privileges enjoyed within the district by any person . . . without his consent." The argument was that Mitchell's premises were built under the express sanction of the local board, with a knowledge of the purpose for which they were to be used, and that by carrying on his business there for years he had acquired rights, powers and privileges which were protected by that proviso. Cockburn, C.J., dealt with that argument thus, "This right, which the respondent was enjoying at the time when this market place was built, was not, I think, a right within the meaning of the section. It was a right which he enjoyed only in common with the rest of Her Majesty's subjects. He had no exclusive right to carry on this business, and he had no greater right than anybody else with suitable premises for setting up and carrying on a similar business. The word 'rights,' especially when taken in conjunction with the words 'powers or privileges,' must mean rights acquired adversely to the rest of the world and peculiar to the individual. Such a right having been acquired, it is but just that the statute should say that any powers exercised by the local authority under the section in setting up a market should not interfere with it; but it could never have been meant that the powers given for the benefit of the inhabitants of the particular district in setting up a market should [323] not be exercised in consequence of some private individual or company having a business of the same description." And Blackburn, J., said, "The respondent had no right, power or privilege to keep it up against any rival that chose to start, and consequently the local authority had power to set up this market although it interfered with the respondent's business, which was simply an exercise of the same right as any one of the public had."

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(1) L. R. 7 Q. B. 690.



In the light of these authorities I think Roman Catholics had no rights or privileges, within the meaning of these words, had they stood alone. But when Parliament introduced the term, "by practice," there can, I think, be little doubt that it intended the words to be used in a wider sense, and had in view what I spoke of as "moral rights." Parliament intended, in fact, that whatever any class of persons was, at the time of the union, with the assent of, or at least without objection from, the other members of the community, in the habit or custom of doing in reference to denominational schools should continue, and should not be prejudicially affected by provincial legislation.

How, then, did things stand at the time of the union? All the schools were, his Grace says, denominational schools, some of them being regulated and controlled by the Catholic Church and others by various Protestant denominations. The means necessary for the support of the Roman Catholic schools were supplied to some extent by school fees paid by some of the parents of the children who attended the schools, and the rest was paid out of the funds of the Church, contributed by its members. There can be no doubt that these schools were in the strictest sense of the word denominational schools, in which the distinctive doctrines and principles of the Roman Catholic Church were taught, and naturally Roman Catholic parents would send their children to these schools. From there being no other schools, as is placed beyond doubt by the affidavits on both sides, than denominational schools, not schools established by law, it is plain that the general public acquiesced in this state of things. They acquiesced in the Roman Catholics being in the [324] matters of education, as his Grace says, "as a matter of custom and practice separate from the rest of the community." From the circumstance that as education was then carried on they had, in common with every other denomination, a right to establish and maintain schools, and in consequence of their doing so they were, in fact, separate from the rest of the community; but that was not because they had a positive right to be so,—it was merely an incident to their right to have schools.

Now, any right the Roman Catholics had, at the time of the union, to establish and maintain schools in which the distinctive doctrines and principles of their Church shall be taught exists still. It is in no way interfered with by the Public Schools Act. Any right they had, by custom or practice, to be separate from the rest of the community, in the matter of education they have unimpaired to-day. The Public Schools Act does not prevent them from

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having their own denominational schools now, if they desire to have them. It does not require all the children of the Province to attend the schools provided for by the Act. The Roman Catholic Church can have schools, and Roman Catholic parents can send their children to these schools as fully and as freely as they did at the time of the union. In these respects, therefore, any rights or privileges the Roman Catholics as a class of persons had, with respect to denominational schools, have not been prejudicially affected.

It is said, however, that Roman Catholics were not at the time of the union compelled to support public schools, they were not taxed for the support of these. True, they were not, but there was then no law which required any person in the country to contribute for school purposes. And, as pointed out by my brother Killam, even this right or privilege, if it can be called one, was not dependent on or connected with the existence of denominational schools. It cannot be said to have been, either by law or practice, a right or privilege with respect to denominational schools. If the Roman Catholics had had no schools they would have been equally as free [325] from taxation for educational purposes. As stated in the affidavits of Polson and Sutherland, no school taxes were collected by any authority prior to the Province entering confederation. The being free from taxation for schools was a right or privilege which they enjoyed only in common with every one else in the Province. It was not a right which they enjoyed adversely to the rest of the community, something which they enjoyed beyond the common advantage of other individuals. They are not now, under the Public Schools Acts, subjected to any exceptional tax. They are only subject to the same taxation as the other ratepayers of the country, so how can it be said that in this respect they are prejudicially affected?

It is, however, argued that by the Public Schools Act a system of free schools supported by public funds is set up, and by reason of these Roman Catholic denominational schools are placed at a disadvantage. They are, it is said, exposed to unfair competition, while at the same time, by the taxation for the public schools, funds which would have been available for, and appropriated by Roman Catholic ratepayers to, the support of their own schools, are diverted from them. But, before the union, any person or persons, or any class of persons, might at any time have established and maintained schools, denominational or non-denominational, which would have entered into competition with the Roman Catholic

schools, and, if possessed of the means, might have endowed and maintained the schools so begun as free schools. The Roman Catholics had no such right or privilege as to schools as would have given them the right to prohibit the establishment and maintenance of such schools. If the argument that, by taxation under the Public Schools Act, the ability of the Roman Catholics to maintain their own denominational schools is lessened, and so they are prejudicially affected, is used, the same argument may be urged in connection with all taxation for provincial and municipal purposes. By the British North America Act the Province has the power of taxation for provincial purposes. At the time of the union no taxes of any kind were imposed, the only public revenue of any [326] kind then collected was the customs duty, usually four per cent. All provincial legislation under which taxes are imposed for provincial or municipal purposes, for making and repairing roads and bridges, or any improvements, is equally open to the objection that by reason of it the ability of Roman Catholics to maintain their schools has been lessened. Such taxes are all burdens to which they, in common with the other people of the Province, were not subject at the time of the union, but to which they, in common with all other ratepayers, are subjected now. This objection, as indeed all the objections urged in favour of the applicant, seems based on the assumption that the schools under the Public Schools Act are denominational schools. Now, they are nothing of the kind, they are in the strictest sense public non-sectarian schools. The Act provides in sect. 8 that they shall be entirely non-sectarian, and no religious exercises shall be allowed in them, except as provided in the 6th and 7th sections. By section 7 religious exercises shall be held in a public school entirely at the option of the school trustees for the district, and upon receiving written authority from the trustees it is to be the duty of the teacher to hold such exercises. The religious exercises permitted in any public school are, by sect. 6, to be conducted according to the regulations of the advisory board. The time for them is to be just before the closing hour in the afternoon, and, to guard against any possible ground of complaint, it is provided in explicit terms that, "In case the parent or guardian of any pupil notifies the teacher that he does not wish such pupil to attend such religious exercises, then such pupil shall be dismissed before such religious exercises take place." That the advisory board will act according to the provisions of the Act, and see to it that any religious exercises prescribed are strictly non-sectarian, must be presumed. If it should, in this matter, fail in its duty, its transgression might be cause of complaint, but its acting

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directly contrary to the plain provisions of the Act could never be used as an argument against the Act itself. Such non-sectarian [327] religious exercises, or the total absence of all such exercises, can never make the schools denominational in their character.

In New Brunswick, at the time of confederation, there was no system of separate schools established by law. But the Parish Schools Act then in force declared that the Board of Education should secure to all children, whose parents did not object, the reading of the Bible in the schools, and that, when read by Roman Catholic children, it should, if required by their parents, be in the Douay version, without note or comment. By that enactment there was secured what many consider a great right and privilege, and Roman Catholics had secured to them the right, if they required it, that when the Bible was read by their children it should be in a particular version. The Common Schools Act, passed after confederation, had no provision on the subject. Then the board of education made a regulation that, "It shall be the privilege of every teacher to open and close the daily exercises of the school by reading a portion of Scripture (out of the common or Douay version as he may prefer) and by offering the Lord's Prayer—any other prayer may be used by permission of the board of trustees, but no teacher may compel any pupil to be present at those exercises against the wishes of his parents or guardian, expressed in writing to the board of trustees." This was a great change from the provision in the Parish Schools Act for the right Roman Catholics had under it, that a particular version of the Bible should be read by their children, if they so desired, was taken away, and the reading of that version or not made optional with the teacher. It was urged in *Ex parte Renaud* (1), that on this as well as the other grounds, the Common Schools Act was ultra vires, but the Court held it was not so. If it was a right or privilege that existed at the union, certainly the Legislature had not protected it by any express enactment; but had it been taken away? If it was a right or privilege, then it would be the duty of the board of education instead of [328] making the regulation they had made, to make one securing just what had been provided for by the Parish Schools Act. The Court held that if this was a right or privilege in respect of denominational schools within the protection of sub-sect. 1 of sect. 93, of the British North America Act, though not protected by the Common Schools Act, it was not taken away, so it could not be said that the right was prejudicially affected.

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(1) 1 Pugsley 273 ante, vol. 2, p. 445.



In this Province at the time of the union Roman Catholics had the right to establish and maintain denominational schools in which the distinctive doctrines and principles of the Roman Catholic Church were taught. To these schools they had the right to send their children.

As incident to the existence of these denominational schools, they were in the matter of education separate from the rest of the community. They maintained these schools at their own expense. Parents who sent children to them paid fees. But no Roman Catholic, as no other person in the Province, could be compelled to contribute to the support of denominational schools.

Which of these possible rights or privileges has been interfered with or affected by the Public Schools Act? It does not enact that there shall be no schools in the Province, except those under the Act, nor does it provide that the distinctive doctrines and principles of the Roman Catholic Church shall not be taught in any schools in this Province. The Roman Catholics may carry on schools since the passing of the Act just as they did at the time of the union. The Act does not say that no school fees shall be paid or collected in schools other than under this Act. The Roman Catholics can, just as they did at the union, collect fees from parents sending children to their schools and maintain their schools in any way they please. There is no provision in the Public Schools Act by which any man in the Province, Roman Catholic or Protestant, can be compelled to support denominational schools.

The only change in the situation is, that while at the union no one could be compelled to contribute for the support of schools—[329] not for the support of public non-sectarian schools, for there were none in existence, nor for the denominational which did exist—for there was no law requiring them to be supported, now, all the property owners in the Province, Protestants and Roman Catholics alike, are compelled to contribute for the support of the public non-sectarian schools.

It is surely a matter of importance for every State that its citizens should be intelligent and educated. Is it not the duty of every State to see there is brought within the reach of all the children in it the means of acquiring at least an elementary education, such an education as will fit them, when they grow up, to exercise intelligently the duties of citizenship. If it is the duty of the State to do this, and I do not see how it can be doubted, then it is the duty of the State to provide the funds necessary for the purpose. Providing these funds must be a provincial purpose, for which it is, by sub-sect. 2 of sect.

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92 of the British North America Act, in the power of a Province to impose taxation within the Province. That providing for the education of the people is a provincial duty is also plainly shewn by the provision, both in the British North America Act and in the Manitoba Act, that it shall be exclusively within the jurisdiction of the Province to make laws on the subject of education. The only limitation on their powers is, that existing rights or privileges by law or practice as to denominational schools shall not be prejudicially affected.

Speaking of the provisions of sect. 93 of the British North America Act, in his report on the New Brunswick Common Schools Act, dated 20th January, 1872, Sir John A. Macdonald, then minister of justice, expressed it as his opinion, that they applied exclusively to denominational, separate or dissentient schools, and did not in any way affect or lessen the powers of Provincial Legislatures to pass laws respecting the general educational system of the Province. The 22nd section of the Manitoba Act must receive the same construction. The Public Schools Act, the validity of which is impeached, is an Act dealing with the general educational system of this Province.

It does not deal with denominational, separate or dissentient schools. Its object is to provide for the general education of the people, to provide public non-sectarian schools, open to all the people of the Province who choose to take advantage of them for the education of their children. I cannot see that any rights or privileges that Roman Catholics enjoyed at the time of the union as to denominational schools are dealt with or in any way prejudicially affected by the Act.

It must, in my opinion, be held that the appeal fails, and that it should be dismissed with costs.

DUBUC, J. :—

This matter comes before the Court by way of motion to reverse the order or decision of my brother Killam, dismissing the summons taken out to quash by-laws Nos. 480 and 483 of the city of Winnipeg.

These by-laws were passed by the city council, to levy for municipal and school purposes a rate of two cents on the dollar, on all ratable property in the said city, being 15 4-5 mills on the dollar for general municipal purposes, and 4 1-5 mills on the dollar for school purposes.

The applicant, John Kelly Barrett, asks in his summons to have the said by-laws quashed for illegality, upon the following among other grounds :—"Because by the said by-laws the amounts to be



levied for school purposes for the Protestant and Catholic Schools are united, and one rate levied upon Protestants and Roman Catholics alike for the whole sum."

The by-laws in question were made in compliance with the provisions of the Act respecting public schools, passed at the last session of the Provincial Legislature, 53 Vict. c. 38, and under the provisions of the Municipal Act.

The said applicant states in his affidavit that the effect of the said by-laws is that one rate is levied upon all Protestant and Roman Catholic ratepayers in order to raise the amount required for school purposes, and the result to individual ratepayers is, that each Protestant will have to pay less than if he were assessed for [331] Protestant schools alone, and each Roman Catholic will have to pay more than if he were assessed for Roman Catholic schools alone.

This involves the constitutional question, whether the said Act respecting public schools is, or is not *intra vires* of the Provincial Legislature.

To determine that serious question, it is important to consider what schools were in existence in this country when this Province was admitted into the Canadian Confederation, and what provisions were made at the time of the union in regard to the matter. It may also be proper to give a brief outline of the laws which, under the provisions of the constitutional Acts, were enacted by the Legislature, were put in operation, and were in force in this Province until repealed and replaced by the statute respecting public schools of last session, and to examine the features of the said last-mentioned statute.

As stated in the affidavit of his Grace the Archbishop of St. Boniface, filed on behalf of the applicant, and not denied by the other side, the following state of facts is shewn:—"2. Prior to the passage of the Act of the Dominion of Canada, passed in the 33rd year of the reign of Her Majesty Queen Victoria, c. 3, known as the Manitoba Act, and prior to the Order in Council issued in pursuance thereof, there existed in the territory, now constituting the Province of Manitoba, a number of effective schools for children; 3. These schools were denominational schools, some of them being regulated and controlled by the Roman Catholic Church, and others by various Protestant denominations; 4. The means necessary for the support of Roman Catholic schools were supplied, to some extent, by school fees paid by some of the parents of the children who attended the schools, and the rest were paid out of the funds of the Church, contributed by its members; 5. During the period

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referred to Roman Catholics had no interest in, or control over the schools of the Protestant denominations, and the members of the Protestant denominations had no interest in, or control over the schools of the Roman Catholics. There were no public schools in [332] the sense of State schools. The members of the Roman Catholic Church supported the schools of their own Church, for the benefit of the Roman Catholic children, and were not under obligation to, and did not contribute to the support of any other schools. In the matter of education, therefore, during the period referred to, Roman Catholics were, as a matter of custom and practice, separate from the rest of the community, and their schools were all conducted according to the distinctive views and beliefs of Roman Catholics as herein set forth."

In the following paragraph of his said affidavit his Grace states that the Church regards the schools provided for by the Public Schools Act as unfit for the purpose of educating their children, and the children of Roman Catholic parents will not attend such schools ; that rather than countenance such schools, Roman Catholics will revert to the system in operation previous to the Manitoba Act, and will establish, support, and maintain schools in accordance with their principles and faith ; that Protestants are satisfied with the system of education provided for by the said Public Schools Act, and are perfectly willing to send their children to the schools established and provided for by the said Act ; such schools are, in fact, similar in all respects to the schools maintained by the Protestants under the legislation in force immediately prior to the passage of the said Act, &c., &c.

The affidavits filed in opposition to the motion state that schools which existed prior to the Province of Manitoba entering confederation were purely private schools, and were not in any way subject to public control, nor did they in any way receive public support. No school taxes were collected by any authority, and there were no means by which any persons could be forced by law to support any of the said private schools.

As stated by my brother Killam, these affidavits are in no way contradictory to or inconsistent with the statements made by his Grace.

[333] In his affidavit, also filed herein, Rev. Professor Bryce gives his views as to what were the views of the Presbyterians of his Province in the years immediately succeeding the entrance of Manitoba into confederation ; but as he only came into this country in 1871, one year after, he does not pretend to contradict any of

the statements made by the Archbishop of St. Boniface on what was the position of affairs in regard to the denominational schools, either Roman Catholic or Protestant, then existing.

So it remains established that the schools then in operation, although there was no law to give them legal sanction, were de facto, *i.e.*, in practice, denominational schools.

The provisions of law in regard to schools, made applicable to Manitoba at the union, were sect. 93 of the British North America Act and sect. 22 of the Manitoba Act.

Under the said provisions of our constitution the Provincial Legislature, at its first session in 1871, passed an "Act to establish a system of education in this Province." By the said Act the Lieutenant-Governor in Council was empowered to appoint not less than ten, nor more than fourteen persons, to be a board of education for the Province, of whom one half were to be Protestants and the other half Catholics; also one superintendent of Protestant schools and one superintendent of Catholic schools, who were joint secretaries of the board.

The duties of the board were described as follows:—"1st. To make from time to time such regulations as they may think fit for the general organization of the common schools; 2nd. To select books, maps and globes to be used in the common schools, due regard being had in such selection to the choice of English books, maps and globes for the English schools, and French for the French schools, but the authority hereby given is not to extend to the selection of books having reference to religion or morals, the selection of such being regulated by a subsequent clause of this Act; [334] 3rd. To alter and sub-divide, with the sanction of the Lieutenant-Governor in Council, any school district established by this Act."

The general board was divided into two sections, and among the duties of each section we find the following:—"Each section shall have under its control and management the discipline of the schools of the section; it shall make rules and regulations for the examination, grading and licensing of teachers, and for the withdrawal of licenses on sufficient cause; it shall prescribe such of the books to be used in the schools of the section as have reference to religion or morals."

By sect. 13 the moneys appropriated to education by the Legislature were to be divided equally, one moiety thereof to the support of Protestant schools, the other moiety to the support of Catholic schools.

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The first board appointed by the Lieutenant-Governor in Council was composed of the Bishop of St. Boniface, the Bishop of Rupert's Land, several Catholic priests, several Protestant clergymen of various denominations, and a couple of laymen for each section.

The said statute was amended from time to time as the country was becoming more settled, and new exigencies arose. But the same system prevailed until the Act of last session; the only substantial amendments were that in 1875 the board was increased to twenty-one, twelve Protestants and 9 Roman Catholics, and the moneys voted by the Legislature were to be divided between Protestants and Catholics in proportion to the number of children of school age in the respective Protestant and Catholic districts.

The more noticeable change in the system was that the denominational distinction between the Catholics and Protestants, and the independent working of the two sections, became more and more pronounced under the different statutes afterwards passed. Sect. 27 of the Act of 1875, c. 27, says that the establishment of a school district of one denomination shall not prevent the establishment of a school district of the other denomination in the same place.

[335] The same principle is carried out and somewhat extended by sects. 39, 40, and 41 of the Act of 1876, c. 1.

In 1877, by c. 12, s. 10, it was enacted that in "no case a Protestant ratepayer shall be obliged to pay for a Catholic school and a Catholic ratepayer for a Protestant school."

So it is manifest that, until the Act of last session, the school system created by the Provincial Legislature under the provisions of the constitutional Act, was entirely based and carried on, on the denominational principle, as divided between Protestant and Roman Catholic schools.

At the last session of the Legislature two Acts were passed in respect of education. The first one, c. 37, abolishes the board of education heretofore existing, and the office of superintendent of education, and creates a department of education which is to consist of the Executive Council or a committee thereof appointed by the Lieutenant-Governor in Council, and also an advisory board composed of seven members, four of whom are to be appointed by the department of education, two by the teachers of the Province, and one by the university council. Among the duties of the advisory board is the power "To examine and authorize text-books and books of reference for the use of pupils and school libraries; to determine the qualification of teachers and inspectors for high and public schools; to appoint examiners for the purpose of preparing examination papers; to prescribe the form of religious exercises to be used in schools."



The next Act is the Public Schools Act, c. 38. It repeals all former statutes relating to education. It enacts, amongst other things, as follows:—Sect. 3, “All Protestant and Catholic school districts, together with all elections and appointments to office, all agreements, contracts, assessments, and rate bills heretofore duly made in relation to Protestant or Catholic schools, and existing when this Act comes into force, shall be subject to the provisions of this Act.” Sect. 4, “The term for which each school trustee holds office at the time this Act takes effect shall continue as if such term had been [336] created by virtue of an election under this Act.” Sect. 5, “All public schools shall be free schools, and every person in rural municipalities between the age of five and sixteen years, and in cities, towns and villages, between the age of six and sixteen, shall have the right to attend some school.” Sect. 6, “Religious exercises in the public schools shall be conducted according to the regulations of the advisory board. The time for such religious exercises shall be just before the closing hour in the afternoon. In case the parent or guardian of any pupil notifies the teacher that he does not wish such pupil to attend such religious exercises, then such pupil shall be dismissed before such religious exercises take place.” Sect. 7, “Religious exercises shall be held in a public school entirely at the option of the school trustees for the district, and, upon receiving written authority from the trustees, it shall be the duty of the teachers to hold such religious exercises.” Sect. 8, “The public schools shall be entirely non-sectarian, and no religious exercises shall be allowed therein except as above provided.”

It provides for the formation, alteration and union of school districts in rural municipalities, and in cities, towns or villages, the election of school trustees, and for levying a rate on the taxable property in each school district for school purposes.

Sect. 92 enacts that “The municipal council of every city, town and village shall levy and collect upon the taxable property within the municipality in the manner provided in this Act and in the Municipal and Assessment Acts, such sums as may be required by the public school trustees for school purposes.”

Sect. 108, which provides for the legislative grant to schools, has the following sub-section, “(3) Any school not conducted according to all the provisions of this or any Act in force for the time being, or the regulations of the department of education or the advisory board, shall not be deemed a public school within the meaning of the law, and such school shall not participate in the legislative grant.” By sect. 141, “No teacher shall use or permit

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[337] to be used as text-books any books in a model or public school, except such as are authorized by the advisory board, and no portion of the legislative grant shall be paid to any school in which unauthorized books are used." By sect. 179, "In cases where, before the coming into force of this Act, Catholic school districts have been established as in the next preceding section mentioned (*that is covering the same territory as any Protestant district*), such Catholic school districts shall, upon the coming into force of this Act, cease to exist, and all the assets of such Catholic school districts shall belong to, and all the liabilities thereof be paid by, the public school district."

It is easy to see from the above that the new Act makes a complete change in the system. The denominational division of Catholics and Protestants is entirely done away with, and by sect. 179, where, as in this case, a Catholic school district is supposed to cover the same territory as any Protestant school district, the said Catholic school district is not only wiped out, but its property and assets are vested in and belong to the other school district, which under the Act becomes the public school district.

Let us see now what are the provisions of the British North America Act and of the Manitoba Act applying to the case. Sect. 93 of the British North America Act enacts that, "In and for each Province the Legislature may exclusively make laws in relation to education, subject and according to the following provisions:—(1) Nothing in any such law shall prejudicially affect any right or privilege with respect to denominational schools which any class of persons have by law in the Province at the union."

The first sub-section of sect. 22 of the Manitoba Act is substantially the same, the only difference being in the addition of the words "or practice," which makes it read thus:—(1) "Nothing in any such law shall prejudicially affect any right or privilege with respect to denominational schools which any class of persons have by law or practice in the Province at the union."

[338] The whole question to be determined in this case turns upon the construction of the words "or practice" added to the provision of the Manitoba Act.

The rules of construction of statutes as laid down by the authorities are well known. Though all based on the strict principles of justice, they, in their application, offer some distinction and some apparent differences in order to meet the numerous exigencies of the various cases under consideration. One rule, perfectly sound as applicable to a particular case, under a particular set of circum-



stances, might be unjust and unfair if applied to another case with different circumstances. Per Lord Blackburn in *Edinburgh Street Tramways Company v. Torbain* (1).

One of the first elementary rules is, that when the words of the statute admit of but one meaning, a Court is not at liberty to speculate on the intention of the Legislature as to construe an Act according to its own notions of what ought to have been enacted. Maxwell on Statutes, 6 ; *York and North Midland Railway Company v. Reg.* (2).

When the language is precise and unambiguous, but at the same time incapable of reasonable meaning, and the Act is consequently inoperative, a Court is not at liberty to give the words, on mere conjectural grounds, a meaning which does not belong to them Maxwell on Statutes, 23.

But the above rule is confined to cases where the language is precise and capable of but one construction.

If the words "or practice," inserted in the Manitoba Act, were as clear and unambiguous as to admit of but one construction, the above rule would have to be applied, and there would be no use for prosecuting the inquiry any further. But such is not the case. They are said to mean that the Roman Catholics, while compelled to contribute to the support of public schools, are by said words allowed to have and maintain their denominational schools as private schools ; this is the narrower construction. They are also alleged to secure to Catholics the privilege of being exempted from compulsory attendance at the public schools ; another and more [339] liberal construction is that the denominational schools, existing as a matter of fact at the time of the union, were given by these words a legal status, so that they could not afterwards be interfered with by the Provincial Legislature.

As seen by these different interpretations, the words "or practice" are susceptible of more than one construction ; another rule then has to be applied.

An old rule of construction says that a thing which is within the letter of the statute is not within the statute, unless it be also within the meaning of the Legislature. Maxwell, 24 ; Bacon's Ab. "Statute" (1.) 5.

As stated by Maxwell, at p. 27, "to arrive at the real meaning, it is always necessary to take a broad general view of the Act, so as to get an exact conception of its aim, scope and object." It is necessary, according to Lord Coke, to consider : 1. What was the law

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before the Act was passed ; 2. What was the mischief or defect for which the law had not provided ; 3. What remedy Parliament has appointed ; and 4. The reason of the remedy." That rule was laid down in *Heydon's Case*, (1) decided as late back as during the reign of Elizabeth, and has been followed ever since.

In order to find out the exact and true meaning of certain words contained in the statute, it becomes sometimes important to go into the history of the matter and examine the external circumstances which led to the enactment in question.

In *River Wear Commissioners v. Adamson* (2), Lord Blackburn says, at p 763 : " I shall state, as precisely as I can, what I understand from the decided cases to be the principles on which the courts of law act in construing instruments in writing ; and a statute is an instrument in writing. In all cases the object is to see what is the intention expressed by the words used. But, from the imperfection of language, it is impossible to know what that intention is without inquiring farther, and seeing what the circumstances were with reference to which the words were used, and what was the object, appearing from those circumstances, which the person [340] using them had in view ; for the meaning of words varies according to the circumstances with respect to which they were used "

" In the interpretation of statutes," says Maxwell, at p. 30, citing *Gorham v. Bishop of Exeter* (3), " the interpreter, in order to understand the subject matter and the scope and object of the enactment, must, in Coke's words, ascertain what was the mischief or defect for which the law had not provided ; that is, he must call to his aid all those external or historical facts which are necessary for this purpose, and which led to the enactment, and for these he may consult contemporary or other authentic works and writings."

In *Attorney-General v. Sillem* (4), Lord Bramwell expressed the same view when he said, at page 531 : " It may be a legitimate mode of determining the meaning of a doubtful document to place those who have to expound it in the situation of those who made it ; and so, perhaps, history may be referred to to shew what facts existed, bringing about a statute, and what matters influenced men's minds when it was made."

Similar language was used by L. J. Turner in *Hawkins v. Gathercole* (5). He says, at pages 20 and 21 :—" In construing Acts

(1) 3 Rep. 76.

(3) Rep. by Moore, p. 462.

(2) 2 App. Cas. 743.

(4) 2 H. &amp; C. 431.

(5) 6 De G. M. &amp; G., 1.

of Parliament the words which are used are not alone to be regarded. Regard must also be had to the intent and meaning of the Legislature. The rule upon the subject is well expressed in the case of *Stradling v. Morgan*, Plowd. 204. . . . The same doctrine is to be found in *Eyston v. Studd*, Plowd. 459. . . .

In determining the question before us we have, therefore, to consider not merely the words of the Act of Parliament, but the intent of the Legislature to be collected from the cause and necessity of the Act being made, from a comparison of its several parts, and from foreign (meaning extraneous) circumstances, so far as they can justly be considered to throw light upon the subject."

In *Holme v. Guy* (1), Jessel, M.R., said :—"The Court is not to [341] be oblivious . . . of the history of law and legislation. Although the Court is not at liberty to construe an Act of Parliament by the motives which influenced the Legislature, yet, when the history of law and legislation tells the Court, and prior judgments tell this present Court what the object of the Legislature was, the Court is to see whether the terms of the section are such as fairly to carry out that object and no other, and to read the section with a view to finding out what it means, and not with a view to extending it to something that was not intended."

In the light of those authorities it becomes necessary, in trying to determine the true meaning of the words "or practice" in the Manitoba Act, to examine under what circumstances these words were introduced into the statute, and the grounds, if they can be ascertained, on which they were inserted.

The 93rd section of the British North America Act gives to the Legislature of each Province the exclusive power to make laws in relation to education, subject, however, to certain restrictions, the first of which says that nothing in any such law shall prejudicially affect any right or privilege which any class of persons have by law, etc. The first sub-section of the 22nd section of the Manitoba Act says :—" . . . which any class of persons have by law or practice," etc.

Why were these words "or practice" introduced? What was intended by said words? The true meaning intended by the Legislature can only be ascertained by examining the historical facts and circumstances connected with the school question, which led to the provisions of the 93rd section of the British North America Act and the 22nd section of the Manitoba Act being enacted.

When the four Provinces of Ontario, Quebec, Nova Scotia and New Brunswick joined in the confederation scheme, each of these

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Provinces was already fully organized, and had a system of public schools established by law. In Ontario and Quebec the law authorized dissentient or separate schools of a denominational character, in localities where the minority had a religious belief different from the creed of the majority. The minorities, in establishing separate or dissentient schools, were exempt from taxation for the support of public schools, and were allowed a proportionate share of the legislative grant. The systems in Ontario and in Quebec were not exactly the same, but they had some common features embodying the principle of denominational schools.

In Upper Canada the question of separate schools had been the subject of a long and bitter struggle between Protestants and Catholics, but the matter had been finally settled by the School Act of 1863.

In Nova Scotia and New Brunswick it appears that the Roman Catholic minorities had in practice their own schools under the common or parish school laws ; but the said schools were not recognised by law as such denominational schools, and the Catholics had no right or privilege by law in respect of denominational schools.

In framing the British North America Act, the fathers of confederation, in order to guard the populations of the different Provinces against the agitation and turmoil which had been raised on that question between Catholics and Protestants in the old Province of Canada, while conceding and asserting the principle that each of the Provinces might exclusively make laws in relation to education, thought proper to protect the religious feelings and secure the right and privilege of the minorities on that subject, by enacting the limitations found in the sub-sections of the 93rd section. These limitations were to apply to new Provinces entering confederation as well as to the four original Provinces.

The extent of the limitations imposed on Provincial Legislatures by the said provisions was first raised and questioned in New Brunswick. The law relating to the subject at the time of the union was the Parish Schools Act of 1858. In 1871 the Legislature of New Brunswick passed an Act relating to common schools, to which the Roman Catholics of the Province had very strong objections. Petitions were sent to the Provincial Legislature, and afterwards to the Dominion authorities, against the coming into effect of the Act. The matter was taken before [343] the Supreme Court of New Brunswick, in *Ex parte Renaud* (1), and an elaborate judgment was pronounced in the case by the

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(1) 1 Pugsley, 273 ; ante, vol. 2, p. 445.



Court. The Court decided in effect that the Catholics of New Brunswick had not *by law* at the union any right or privilege in respect to denominational or separate schools. In dealing with the question, the Court insists on the fact that the Catholics had no rights or privileges by law, which were the only rights or privileges contemplated and secured by the first sub-section of sect. 93 of the Act. The expression "legal right or privilege" is almost constantly used. In the course of the judgment Chief Justice Ritchie, now Chief Justice of the Supreme Court of Canada, speaking for the majority of the Court, said:—"Where is there anything that can, with any propriety, be termed a legal right? Surely the Legislature must have intended to deal with legal rights and privileges. How is it to be defined—how enforced?" And elsewhere:—"If . . . the Roman Catholics had . . . no legal rights, as a class, to claim any control over, or to insist that the doctrines of their Church should be taught in all or any schools under the Parish School Act, how can it be said (though as a matter of fact such doctrines may have been taught in numbers of such schools) that as a class of persons they have been prejudicially affected in any legal right or privilege with respect to 'denominational schools,' construing those words in the ordinary meaning, because under 'The Common Schools Act, 1871,' it is provided that the schools shall be non-sectarian?"

From the above quotations, where *legal* rights only are considered and dealt with, and from the other arguments advanced and expressions used, it may fairly be inferred that if the Roman Catholics of New Brunswick, instead of having only their right and privilege *by law* secured by the statute, they had had their right and privilege *by practice* equally secured, the judgment of the Court might have been different.

As to the point raised on the argument by Mr. Ewart, of [344] counsel for the applicant, that the words "or practice" were likely inserted in the Manitoba Act to remedy the defect which caused the difficulties in New Brunswick, which point was answered by the Attorney-General, that such could not be the case, because the New Brunswick Common Schools Act was passed only in 1871, one year after the Manitoba Act, this, at least, may be said: It appears from the journals of the Legislative Assembly of New Brunswick that the bill relating to common schools was introduced and put through the House of Assembly by the Hon. Geo. A. King, Attorney-General of the Province, in 1871; that the same Hon. Geo. A. King had, in 1869, introduced in the Legislative Assembly a similar bill, which had been read a first time; that the same

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Hon. Geo. A. King did, on the 24th of February, 1870, introduce a similar bill, which was read a first and second time, referred to the committee of the whole, and considered and discussed in four distinct sittings of the said committee of the whole, on the 17th March, 22nd March, 31st March, and 1st April. That bill provided that it was not to come into operation for one year after the passage thereof.

The Manitoba Act passed by the Dominion Parliament did not become law until the 12th of May of the same year. It was not introduced into the House until the second day of May, more than a month after the discussion in the Legislature of New Brunswick of the Common Schools Bill in question. Is it not therefore reasonable to infer and presume that the discussion which took place in the Legislative Assembly of New Brunswick at the different sittings held on said School Bill in question were, as usual, reported and criticised in the public press, and that such reports and criticisms came to the knowledge of members of the Dominion Government and other persons who had something to do with the framing of the Manitoba Act? This most natural inference becomes, under the circumstances, such a presumption as not to be neglected in the construction of the words in question. Presumptions are constantly used in determining the real intent and meaning of statutes.

[345] We have the fact that, when the Manitoba Act was passed there were denominational schools in this country, and the further fact that there was no law to protect in their privilege the minorities of the future, either Catholic or Protestant, who might wish the continuance of said denominational schools. These facts, we must assume, were well known to the legislators. If the Province had entered confederation with no other protection to minorities, with respect to denominational schools, than the ~~first~~ sub-section of sect. 93 of the British North America Act, as there was no law in the country with respect to denominational schools, or even to any kind of schools, the first sub-sect. of sect. 93, or its re-enactment without modification in the Manitoba Act, would have remained a dead letter. As there was no law, there was no right or privilege by law to be protected. The Roman Catholics of this Province were even in a worse position than those of New Brunswick, because there, as seen by the judgment of the Supreme Court of that Province already referred to, the Catholics had, under the Parish Schools Act of 1858, numbers of schools in which, as a matter of fact, the doctrines of their Church were taught, though the Parish Schools Act did not confer on them, as a class, any right



or privilege with respect to denominational schools. This position of affairs must have impressed the men who framed the Manitoba Act, and shews conclusively to my mind that the words "or practice" were inserted in the Manitoba Act for only one and very manifest purpose, that is, to protect in their right and privilege, as to denominational schools, the Catholics or Protestants who might in the future find themselves in the minority in this Province.

We must not overlook the fact that it was considered, and well known at the time, that the Protestants and Catholics were in about equal numbers in the Province. That proposition is sufficiently established by the fact that the first school Act passed by [346] the Manitoba Legislature in 1871 provided that an equal number of Protestants and Catholics were to be appointed as members of the Board of Education, and that the moneys voted by the Legislature should be equally divided, one half to be appropriated for the support of Protestant schools, and the other half for the support of Catholic schools.

Another fact not to be left unnoticed is that Manitoba was the only Province entering confederation after the original union for which the provisions of sect. 93 of the British North America Act were departed from and modified. Nothing of the kind is found in the terms made with British Columbia and Prince Edward Island when they entered confederation in 1871 and 1873. Why was that departure from the provisions of the British North America Act made in regard to denominational schools for Manitoba only? Undoubtedly because it was well known that the population of this Province was equally divided between the Protestants and Roman Catholics, and that there were already by practice, in the country, denominational schools, which the Legislature intended to protect and ensure permanently to any class of persons, either Protestants or Catholics, who might desire to continue in the enjoyment of that privilege. That accounts for the insertion of the two words "or practice" in the Manitoba Act.

Before examining more fully what is the true and real purport of the words "or practice," as applying to the right and privilege in question, it may be convenient to consider what is a right and what is a privilege. A right is a just claim, a legal title, something positive which can be enforced by law. A privilege is sometimes also a direct advantage or benefit, but it is often considered more as of a negative character, such as an immunity, an exemption from some burden beyond the common advantage of other individuals. So the words "right" and "privilege" are technical words, having by themselves well defined legal meanings.

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[347] The same cannot be said of the word "practice," in the sense in which it is used in this sub-section. It is not a technical legal word, and it has no particular legal meaning. It is not found in any such sense in law dictionaries. It is only an ordinary popular word, to be construed in its ordinary popular sense. It means custom or habit, use or usage. In the sub-section in question it qualifies the words "right" and "privilege." "Privilege by law" may be considered a technical expression, to be construed according to its technical meaning; but "privilege by practice" becomes an ordinary popular expression, to be interpreted in its popular sense.

"The words of a statute," says Maxwell, at p. 67, "are to be understood in the sense in which they best harmonize with the subject of the enactment and the object which the Legislature has in view."

In *Jessen v. Wright* (1), Lord Redesdale says, at p. 56, "That the general intent shall overrule the particular is not the most accurate expression of the principle of decisions. The rule is that technical words shall have their legal effect, unless from other words it is very clear that the testator meant otherwise." The above was quoted approvingly by Lord Wensleydale in *Roddy v. Fitzgerald* (2).

In *The Fusilier* (3) the words "persons belonging to the ship," in the Merchant Shipping Act, 1854, were, in a matter of reward for salvage, construed to apply to passengers as well as to the crew. "As to the words 'belonging to such ship,'" says Dr. Lushington, "'belonging' is certainly a word ancipitis usus with reference to the subject matter; but one of the rules of construing statutes, and a wise rule, too, is that they shall be construed uti loquitur vulgus, that is, according to the common understanding and acceptance of the terms, and I think that nothing is more common than to say of passengers by a ship that they are persons belonging to the ship, and would be included under the expression 'persons.'"

[348] In this case the expression "privilege by practice" must be construed in its popular sense, having always in sight the object which the Legislature had in view when they were dealing with limitations to the power of the Provincial Legislature in regard to schools, and when they knew that certain classes of persons had by practice, i.e., by custom and usage, denominational schools which were sought to be protected. That construction "harmonizes best with the object which the Legislature had in view."

(1) 2 Bligh 1.

(2) 6 H. L. C. 823, 877.

(3) 34 L. J. P. M. &amp; A. 27.

The mere change of a word in a similar statute for another word of the same purport, or the addition of one or more words of the same purport as the word already used, does not always shew an intention of the Legislature to have it operate as a change or alteration of the meaning; but it is not so here. The words "by law" and "by practice" cannot be considered as of the same purport. The addition of the words "or practice" shews clearly an intention of the Legislature to give an entirely new meaning to the provision, and to add something to the limitation already imposed on the Provincial Legislature, in order to make it apply to, and provide for, the case under consideration. What is then the true meaning intended by the Legislature in inserting those words?

It is contended that very little importance should be attached to these words. It cannot, however, be supposed that they were placed there fortuitously, unmeaningly, on the speculative chance that they might fit some hypothetical unknown state of things. The position of denominational schools then existing by practice was known by the framers of the Act through the delegates sent from this country to negotiate and arrange with the Dominion authorities the terms on which the new Province would enter confederation. In the course of those negotiations, the provisions respecting schools to be inserted in the Act must have been fully discussed. Those words were therefore inserted advisedly to secure to those interested the permanency of denominational schools enjoyed at the time by [349] practice, but not recognised by law. This must have been the privilege by practice meant by the provision.

The adverse contention is, that the only privilege enjoyed by Roman Catholics before the union, and secured by the words "by practice," was the privilege of having denominational schools sustained by themselves as private schools, and that, under the new school law, they may have the same privilege still. The privilege of being taxed for the support of schools from which, according to their conscience and to the principles of their faith, they could derive no benefit, and of taxing themselves besides for the only schools to which they could conscientiously send their children, would be a very strange privilege indeed. Let us see whether such could have been the intention of the Legislature in adding the words "or practice" in the Manitoba Act.

Strictly speaking, the Legislature has, within the scope of its jurisdiction, the unlimited power to make any, even unjust or absurd, enactments. But, at the same time, it is never contemplated that in civilized modern countries a legislature would disregard and set at naught the well known principles of natural

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justice and equity. The right of any persons or class of persons to have and support private schools is a primordial right, as the right to breathe air or eat bread. Supposing the legislature of a province, having full power to do so, would pass a public school Act with compulsory attendance, which all ratepayers would be bound to support, that would not affect the natural right of a citizen to teach his own children in his own house, before school time in the morning, between school hours in the middle of the day, or after the closing of the public school in the afternoon, and so to have and conduct a private school in his own premises. Nothing even would prevent him from having his neighbour's children attending such teaching, or having such teaching done by his daughter, or any other person. This would be a private school which no one would by law be bound to support, a school of the same nature as those [350] stated to exist before the union. Such a natural right does not want any legislation to protect it. Can we, therefore, suppose that the only thing which was aimed at and intended by the Dominion Parliament in adding the words "by practice" was to protect and insure to the minority of the future the natural right to have such schools? Can we, reasonably, assume that the Federal Parliament, anticipating and fearing that the Manitoba Legislature might, against all natural justice and fairness, deprive a whole class of persons of such primordial right, inserted the words "or practice" for the only purpose of guarding and protecting the minority that might be, against such unjust and oppressive legislation? That surely could not have been anticipated, and the enactment could not have been intended to prevent such imaginary mischief.

In *Reg. v. Skeen* (1) Lord Campbell said, "Where by the use of clear and unequivocal language, capable only of one construction, anything is enacted by the Legislature, we must enforce it, although, in our opinion, it may be absurd or mischievous. But if the language employed admit of two constructions, and according to one of them the enactment would be absurd or mischievous and according to the other it would be reasonable and wholesome, we surely ought to put the latter construction upon it as that which the Legislature intended." A similar view was expressed by Parke, B., in *Becke v. Smith* (2) where he held that, when the grammatical construction of the words used would lead to any manifest absurdity or inconvenience, the language may be varied or modified so as to avoid such inconvenience.

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(1) Bell C. C. 97, 115.

(2) 2 M. & W. 191.



But, as it may be further objected on this point, as the legislature has the power to pass statutes to establish a State Church, to prescribe an oath of supremacy objectionable to Roman Catholics, to disfranchise or create other disabilities affecting them, why was there no provision made to protect them against such contingencies? The reason is obvious, because it was confidently and rightly understood and taken for granted that the people on whom a constitution, [351] based on the representative system, was being conferred were civilized and reasonable enough not to wantonly depart, on these questions, from the broad and equitable principles prevailing in modern British and other civilized constitutional institutions. A constitution assumes a certain number of general principles, and is not supposed to provide for every minor detail of having its provisions carried out. As to schools, however, the question had very properly to be looked upon in a different light. The experience of the past had taught a profitable lesson; the difficulties and controversies which had arisen before on that question in Ontario, Quebec, and other centres of mixed population, the strong prejudices by which certain persons and certain classes were liable to be carried on that point, engendering the most bitter feelings in communities otherwise living harmoniously together, must have shewn to the legislators that this was a live and burning question to be settled and provided for, and influenced them to protect the new Province against the trouble and agitation experienced over it elsewhere.

If, as I have stated, by being narrowly construed to protect only private schools which need no protection, the words "or practice" would be a superfluous and meaningless enactment, they must have some other meaning. By carefully considering all the circumstances which led to their being inserted in the Manitoba Act, it appears to me most evident that the Dominion Legislature, knowing that there were effective denominational schools in the country, knowing also that there being no law to authorize them, the right or privilege to have them maintained would not be secured after the union by the provisions of the British North America Act, clearly intended to give legal sanction to the privilege enjoyed by practice.

To the contention that the new school law does not interfere with the privilege of any class of persons to have still denominational schools, as private schools, the Roman Catholics can justly say:—If the new Act does not take from us the right of having our schools, it deprives us of the privilege of subscribing exclusively [352] for our own schools. Prior to the union the Roman Catholics

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had the positive right of having their own denominational schools ; they had, besides the negative right, that is, the privilege of not being compelled to support other schools. They had that right and privilege as a matter of fact, and the words “or practice” were inserted to prevent their being interfered with under the new constitution.

Besides considering the historical facts and circumstances bearing upon a statute to ascertain its real sense, another mode of determining its true meaning is to examine its different parts, and even parts of other Acts on the same subject. As stated by Lord Mansfield in *Rex v. Loxdale* (1), “where there are different statutes in *pari materia*, though made at different times, or even expired, and not referring to each other, they shall be taken and construed together as one system, and as explanatory of each other.”

According to L. J. Turner, in *Hawkins v. Gathercole* (2), already cited, the Court has to consider not only the words of the Act of Parliament, but the intent of the Legislature, to be collected from the cause and necessity of the Act being made, from a comparison of its several parts, and from foreign circumstances, so far as they can justly be considered to throw light upon the subject.

So far, I have dealt only with sub-sect. 1 of sect. 93 of the British North America Act, and the corresponding sub-section in the Manitoba Act.

The second sub-section of the said 93rd sect. of the British North America Act extends to the dissentient schools of the Protestants and Roman Catholics of Quebec, the powers, privileges and duties conferred and imposed by law at the union on the separate schools and school trustees of the Roman Catholics in Upper Canada.

By the third sub-section it is enacted that:—“Where in any Province a system of separate or dissentient schools exists by law at the union, or is thereafter established by the Legislature of the Province, an appeal shall lie to the Governor-General in Council from [353] any act or decision of any provincial authority affecting any right or privilege of the Protestant or Roman Catholic minority of the Queen’s subjects in relation to education.”

The fourth sub-section provides for remedial laws to be made by the Parliament of Canada for the due executions of the provisions of that section and of any decision of the Governor-General in Council as the circumstances of each case may require, on an appeal being made for that purpose. Of these provisions the first sub-section is reproduced in the Manitoba Act with the addition of the words “or practice.” Sub-sect. 2 is omitted. Sub-sect. 3 is re-enacted



in an altered form ; the first three lines are omitted, and the appeal is allowed, not only from any act or decision of any provincial authority, but also from any act or decision of the Legislature of the Province. Sub-sect. 4 is inserted verbatim. Sub-sects. 2 and 3 of sect. 22 of the Manitoba Act correspond to sub-sects. 3 and 4 of sect. 93 of the British North America Act.

In this case we have nothing to do with the appeal provided for by the two last-mentioned sub-sections. But we are entitled to consider them if they can throw any light on the meaning of the first sub-section.

The first sub-section speaks of any right or privilege with respect to denominational schools ; the second sub-section gives an appeal from any act or decision of the Legislature, or of any provincial authority, affecting any right or privilege of the Protestant or Roman Catholic minority in relation to education. If the minority, either Protestant or Catholic, had any right or privilege in relation to education, it must be a right or privilege in regard to their own respective schools, that is, their own denominational schools. Why should there be an appeal to protect their right or privilege if they had none ? The appeal must have been provided because the Dominion Legislature meant and intended that the denominational schools which Protestants as a class, and Roman Catholics as a class, had by practice at the union, were to have a legal recognition under [354] the Manitoba Act, and as such were to be protected against any act of the Provincial Legislature, as well as against any act or decision of any provincial authority. The meaning which I have held should be given to the words "or practice," is thus explained and confirmed by reference to the other provisions of sect. 22 of the Manitoba Act, and the corresponding provisions of the 93rd sect. of the British North America Act. As already mentioned, there was no reason to re-enact in the Manitoba Act any of the provisions of the 93rd sect. in relation to denominational schools, and in relation to appeals by minorities, if there was no such privilege already existing by practice which was intended to be recognised by law under the new constitution.

An objection made against the claim of the applicant is, that if the Roman Catholics are entitled to be secured in the continuance of the denominational schools, the other various denominations of Protestants would have the same privilege. I do not see that this is an objection at all. The provision speaks of any class of persons having by law or practice any right or privilege with respect to denominational schools. As it is established that the schools existing at the union were denominational schools, respectively con-

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trolled by the Roman Catholics and by the various Protestant denominations, I see no reason to doubt that, if the first sub-sect. of the 22nd sect. of the Manitoba Act is to be taken alone and independently of the other sub-sections, the adherents of the English Church, the Presbyterians, the Episcopalians and any other denominations of Protestants who had by practice denominational schools at the time, would be entitled, under this provision, to keep and maintain them as such. That is one aspect of the question.

The other aspect appears when we look at the other sub-sections in the British North America Act and in the Manitoba Act. Christians who for centuries have been in all Christendom divided [355] into two great classes, Roman Catholics and Protestants, and designated as such, are also in the above-mentioned sub-sections, for the purpose of denominational schools, divided and designated as Roman Catholics and Protestants. It being an elementary rule that construction of a statute is to be made of all its parts together, and not of one part only, we must look to these different provisions applying to the subject matter, and in doing so we are led to the conclusion that the Legislature, in speaking of any class of persons in respect of denominational schools, intended to refer to the Roman Catholics as a body, and to Protestants as a body, and to apply the protection to either one or the other who might happen to be in the minority.

It is also said that the only privilege secured to the Roman Catholics by the words "or practice," is the right to be exempt from compulsory attendance at the public schools which might be established. But there was no such thing here at the time as public schools in the sense of state schools, and no such thing as compulsory attendance. That question of compulsory attendance was not in issue between Protestants and Catholics, or between particular denominations of Protestants. That question could not have been contemplated in the limitation clause of the Manitoba Act, as securing the right or privilege of any class or body of Christians against the probable tendencies of any other Christian body who might thereafter find themselves in the majority. The words, therefore, were not inserted to prevent a wrong, or remedy an evil which did not exist, was not foreseen, and was not apprehended because it was not in issue.

On the argument it was contended by the Attorney-General that, if the Catholics have, by the first sub-sect. in the Manitoba Act, the privilege of being exempt from contributing to the support of any other but their own denominational schools, the Provincial

Legislature would be deprived of the power to pass any effective school law, because the persons who had no children, and had not [356] to pay for any schools before the union, would claim that the privilege heretofore enjoyed by them from being taxed to support any schools would be prejudicially affected. The objection is not a serious one. The law deals with classes, not individuals. The provision was made to protect the rights and privilege which any class of persons had with respect to denominational schools, not the claim or privilege of individuals who happened not to support any school.

It was also urged by the Attorney-General that, if the Dominion Parliament had intended to secure to the Catholics of the Province the right to have their own denominational schools as in Ontario and Quebec, why was not a special provision in regard to it put in the Manitoba Act, similar to the 2nd sub-sect. of the 93rd sect. of the British North America Act? And he argues that the omission shews that there was no such intention. In the first place, that sub-section is a positive provision extending to the dissentient schools in Quebec the powers, privileges and duties which the Catholics of Ontario had by law before the union in regard to separate schools. There were no such schools existing by law in this country at the time. In the second place, the question may be satisfactorily answered by its being thus retorted :—If the Dominion Parliament did not intend to secure to the Roman Catholics the right and privilege enjoyed by them at the union with regard to denominational schools, why were the principal provisions of the 93rd sect. of the British North America Act re-enacted in the Manitoba Act, and why were such provisions amended by extending further and increasing the limitations already imposed on Provincial Legislatures? If Parliament had no such intention, the British North America Act was quite sufficient. There was no necessity, and no use, for re-enacting its provisions and extending the limitation clause already existing.

Reverting to the interpretation of statutes susceptible of more than one construction, it is an elementary rule that the construction which appears more just and more reasonable will be adopted.

[357] In *Reg. v. Monck* (1), Brett, L.J., said that “where a statute is capable of two constructions, one of which will work manifest injustice, and the other will work no injustice, you are to assume that the Legislature intended that which would work no injustice.” Lord Blackburn expressed the same view in *Countess of Rothes v. Kirkcaldy Waterworks Commissioners* (2), when he

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(1) 2 Q. B. D. 544, 555.

(2) 7 App. Cas. 694, 702.



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said, "I quite agree that no Court is entitled to depart from the intention of the Legislature as appearing from the words of the Act, because it is thought unreasonable. But when two constructions are open, the Court may adopt the more reasonable of the two."

In some cases, when the occasion justifies it, the Court goes so far as to modify the language of the enactment, or add to it, in order to give it a reasonable construction.

In *Hollingworth v. Palmer* (1), Parke, B., after reading sect. 16 of 7 & 8 Vict., c. 112, which was to be construed, said, at p. 281, "This section is certainly most incorrectly worded, and it is, therefore, necessary to modify its language, in order to give it a reasonable construction. The rule we have always followed of late years is to construe statutes, like all other written instruments, according to the ordinary grammatical sense of the words used, and, if they appear contrary to or irreconcilable with the expressed intention of the Legislature, or involve any absurdity or any inconsistency in their provisions, they must be modified so as to obviate that inconvenience, but no further."

In *Tennant v. Howatson* (2) the words "Nothing contained in this ordinance," were held to mean, "Nothing contained in the two next preceding sections of this ordinance."

In this case, however, we have not to resort to any such modification of the language of the enactment, nor to any addition thereto. In construing the provision questioned, which provision is clearly susceptible of more than one construction, it is not difficult to see which construction is more reasonable and more conducive to [358] justice. The Roman Catholics had by practice denominational schools before the union; during nineteen years since the union, and until the new School Act was passed, they had said denominational schools recognised and authorized by law. They declare, under the oath of the Archbishop of St. Boniface, the head of their Church in this Province, that, on the principle of their religious belief, and on the ground of conscience, they consider the schools provided for by the new Schools Act not fit for the purpose of educating their children, and that their said children will not attend said schools, that rather than countenance such schools they will have to establish, support and maintain schools in accordance with their principles and faith.

If the narrower construction of the provision in question is adopted, they will have to tax themselves to support their own schools, the only schools which in conscience they can send their children to, and they will have, besides, to be taxed and to pay for



the support of the other schools, schools from which the non-Catholics will derive all benefit, and the Catholics themselves no benefit whatever. Moreover the legislative grant, which is the people's money, contributed by Catholics as well as by other citizens, will be exclusively devoted to assist the other schools, while the Catholics will not get their proportionate share to maintain their own schools. Would not that be most unreasonable, and a great injustice to the Roman Catholics, while the other portion of the community would get more than naturally they would be reasonably and justly entitled to? Now, if the broader and more equitable construction prevail, the Roman Catholics, in being allowed to have their schools maintained and recognised by law, would get nothing more than strict and fair justice, and the non-Catholics would suffer no injustice.

Protestants and Catholics have different views and different principles as to the education which children should receive in elementary schools. Some Protestants are adverse to any religious [359] teaching in public schools, and hold that such teaching should be purely secular; others, and, I think, a larger proportion of them, are desirous that the general principles of Christianity be taught, and that there should be some scriptural reading and other exercises of a religious character. As to Roman Catholics, they go farther. While believing that the teaching of secular subjects required by the State should be given due consideration and full effect, they hold, as a matter of conscience, based on the principles of their faith, that their children should also be taught in the doctrines and tenets of their Church, and that the religious exercises should be those of the Roman Catholic Church, and no other.

As stated by the Archbishop of St. Boniface in his affidavit filed:—"Protestants are satisfied with the system of education provided for by the Public Schools Act, and are perfectly willing to send their children to the schools established and provided for by the said Act. Such schools are, in fact, similar to the schools maintained by the Protestants under the legislation in force immediately prior to the passage of the said Act." The Archbishop is, in that, substantially corroborated by the Reverend Professor Bryce, who says, in his affidavit filed, that the Presbyterians are able to unite with their fellow Christians of other churches in having taught in the public schools (which they desire to be taught by Christian teachers) the subjects of secular education. It is easy to understand why the various denominations of Protestants can unite in a common system of public schools, and why Roman Catholics cannot similarly join their Protestant fellow-citizens. Protestants are more or less

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divided between themselves on certain matters of doctrine, and on some formal precepts of a dogmatic character ; but a very large number of general principles, and a considerable amount of doctrinal tenets of Christianity, are held in common by all of them. If they differ on certain particular points, they agree on a great many things. In school matters they practically entertain the same views, and find no difficulty in uniting together. But the differences [360] between the Roman Catholics and the various denominations of Protestants are wide and substantial, and include most essential points of dogma and discipline. It is not an uncommon thing, in this country at least, to see Protestant ministers of different denominations exchange pulpits on certain occasions. No one would even think of seeing the same thing done between a Protestant minister and a Roman Catholic priest. The same characteristic differences are held by Catholics to exist on the school question. While some Protestants may not be able to see why Catholics should have conscientious objections to send their children to public schools taught by Protestant teachers, Catholics have actually such conscientious objections, and hold that they are insuperable. A man's conscience is a thing of such a personal and idiosyncratic character, that it cannot be measured by the particular feelings and dictations of any other man's conscience.

The State may hold that ignorance is an evil to be remedied by public instruction, and may see that certain secular subjects, which are known to form the basis of a proper education, be taught in schools assisted by public money. But in a community composed of different elements the State should not ignore the particular condition, wants and just claims of an important class of citizens, especially when such important class are in every respect loyal and law-abiding subjects, and there is nothing in their wants and claims clashing with the rights of other classes, or contrary to or conflicting with the letter, the spirit or the true principles of the constitution. The liberty of conscience is one of the fundamental principles of our constitution. What the Roman Catholics ask in claiming the right to maintain their denominational schools is only the carrying out, to the full extent, of that fundamental principle. The desirability of having religious instruction combined with secular teaching in schools is, as stated by my brother Killam, considered as of the [361] utmost importance by very many Protestants as well as by Roman Catholics.

I may, on this point, take some brief references from a very important public document, the final report of the commissioners appointed to inquire into the Elementary Schools Act, England and



Wales. The commission was issued by Her Majesty the Queen on the 15th January, 1886, to 24 distinguished men of England, chosen for their learning, their ability, and their high social position, the very large proportion of whom were Protestants of various denominations. The inquiry was very extensive, and lasted until June, 1888, when the final report was made, and afterwards presented by command of Her Majesty to both Houses of Parliament.

At page 112 of their said report the commissioners say :—" Upon the importance of giving religious as well as moral instruction, as part of the teaching in day public elementary schools, much evidence was brought before us." And at page 113 :—" All the evidence is practically unanimous as to the desire of the parents for the religious and moral training of their children."

At page 124 :—" We are convinced that if the State were to secularize elementary education, it would be in violation of the wishes of the parents, whose views on such a matter are, we think, entitled to the first consideration. Many children have no other opportunity of being taught the elementary doctrines of Christianity, as they do not attend Sunday schools, and their parents, in the opinion of a number of witnesses, are quite unable to teach them."

Such were the views of the commissioners as to the religious teaching in schools.

As to the conscience question, the commissioners say, at page 121 :—" While we are most anxious that conscientious objections of parents to religious teachings and observances in the case of children should be most strictly respected, and that no child should, under any circumstances, receive any such training contrary to a parent's wishes, we feel bound to state that a parent's [362] conscientious feelings may be equally injured, and should be equally respected and provided for, in the case where he is compelled by law to send his child for all his school time to a school where he can receive no religious teaching."

At page 127 :—" After hearing the arguments for a wholly secular education we have come to the following conclusions :— . . . .  
(4) That inasmuch as parents are compelled to send their children to schools, it is just and desirable that, as far as possible, they should be enabled to send them to a school suitable to their religious connections or preferences." The same thing is repeated as the 69th of their concluding recommendations at page 213 of the report.

An argument has been advanced, in this country and elsewhere, that State aid given to schools where religious teaching is carried on would be an endowment to religious education, which the State

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should not undertake to do. Such, however, is not the opinion of the commissioners. The report says, at page 119 :—“ We cannot concur in the view that the State may be constructively regarded as endowing religious education when, under these conditions, it pays annual grants for secular education in aid of voluntary local effort to schools in which religious instruction forms part of the programme.”

As to the religious teaching in schools, the opinion of five of the commissioners who made a special report is thus expressed at page 244 :—“ We recognise that for the great mass of the people of this country, religious and moral teaching are most intimately connected, and that in our judgment the effectiveness of the latter depends to a very large extent upon religious sanctions. We think that the present liberty of religious teaching recognised by law for local managers is an ample security that so long as the prevalent opinion of the country remains unchanged, the education of the children and the formation of their character will be based upon those principles which are dear to the mass of the people.”

[363] The above quotations shew that the views of the Roman Catholics of this country on religious teaching in schools are not much different from those entertained by the mass, as well as by the cultured portion of the people of England, Protestants as well as Roman Catholics.

On the grounds hereinbefore mentioned, and on the authorities cited, I believe that the re-enactment in the Manitoba Act of the main provisions of the 93rd sect. of the British North America Act was for the purpose of insuring, under the constitution of the new Province, to any class of persons who might desire it, the maintenance of the denominational schools existing at the time of the union ; that the words “ or practice,” added to the first sub-section of the 22nd sect. of the Manitoba Act can have no other meaning, and should receive no other construction than that they were clearly intended by the Legislature to give a legal status to the said denominational schools, which, as a matter of fact, were known to exist at the time, though not recognised by any law ; that the said interpretation should be adopted on the ground, amongst others, that if the Roman Catholics are allowed to have their denominational schools maintained under the law, no injustice or detriment whatever will result to the other classes of the population, while otherwise, by being obliged to establish and support schools to which they could conscientiously send their children, and paying at the same time for schools from which they cannot and will not derive any benefit, the Roman Catholics will suffer a very great injustice,

and the Legislature, by inserting the words "or practice," intended to provide, and in fact did provide against such injustice being done to the Catholic minority in this Province.

I am, therefore, led to the conclusion that the Public Schools Act of last session, by which the denominational schools, heretofore existing, are legislated out of legal existence, prejudicially affects the privilege which the Roman Catholics had by practice at the time of [364] the union with respect to denominational schools; that in consequence the said Public Schools Act is ultra vires of the Provincial Legislature, and that the two by-laws in question passed in compliance with the provisions of the said Act are illegal and should be quashed.

In my opinion the order of my brother Killam should be reversed, and the summons made absolute, with costs.

BAIN, J. :—

This is an application to reverse an order made by Killam, J., dismissing on application made under sect. 258 of the Municipal Act, to quash the by-laws of the city of Winnipeg, numbered 480 and 483, authorising an assessment for city and school purposes in the city for the current municipal year. These by-laws enact that a rate or tax of two cents on the dollar shall be levied and collected on the whole assessed value of the real and personal property in the city, of which rate 4 1-5 mills on the dollar is to be for school expenditure, and the balance for interest on debentures and ordinary municipal expenditure. The application to quash the by-laws is made on the ground that they are illegal, "because by the said by-laws the amounts to be levied for school purposes for Protestant and Roman Catholic schools are united, and one rate levied upon Protestants and Roman Catholics alike for the whole sum." It is not questioned that the Public Schools Act, 53 Vict., c. 38 (M. 1890) authorizes the assessment or levy that the by-laws provide for, but it is contended that the Act itself, providing as it does for the establishment of a provincial system of free and non-sectarian public schools, for the support of which all taxable property is made liable to be assessed and taxed, is ultra vires of the Provincial Legislature, and that the previous School Act, which the Act assumed to repeal, is still in force, and that under it the taxes for the support of Protestant and Roman Catholic schools must be levied separately on the property of Protestants and Roman Catholics respectively.

Under the School Acts in force in the Province previous to the [365] passing of the Public Schools Act of 1890, there were two distinct sets of public or common schools, the one set Protestant

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and the other Roman Catholic. The Board of Education, which had the general management and control of the public schools, was divided into two sections, one composed of all the Protestant members, and one of the Roman Catholic members, and each section had its own superintendent. The school districts were designated "Protestant" or "Roman Catholic," as the case might be; the Protestant schools were under the immediate control of trustees elected by the Protestant ratepayers of the district, and the Catholic schools, in the same way, were under the control of trustees elected by the Roman Catholic ratepayers; and it was provided that the ratepayers of a district should pay the assessments that were required to supplement the legislative grant to the schools of their own denomination, and that in no case should a Protestant ratepayer be obliged to pay for a Roman Catholic school, or a Catholic ratepayer for a Protestant school.

The Public Schools Act of 1890 repealed all former School Acts, and established in place of the two sets of schools that had existed under these Acts, a system of free and non-sectarian public schools, for the support of which all taxable property is liable to be taxed. It is under the authority that this Act gives that the by-laws in question were enacted; and the question that arises on the application to quash them is the exceedingly grave and important one, whether or not the Legislature, in passing this Act, has exceeded the powers and jurisdiction conferred upon it by the constitution of the Province?

The power of the Provincial Legislature to make laws concerning education is derived from sect. 22 of 33 Vict., c. 3, D., usually known as the Manitoba Act. By sect. 2 of this Act the provisions of the British North America Act, 1867, except those of them that specially applied to or affected only individual Provinces, and except so far also as they were varied by the Manitoba Act, were made applicable to the new Province, as if it had been one of the [366] Provinces that were originally united to form the Dominion. By sect. 93 of the British North America Act it is provided that: "In and for each Province the Legislature may exclusively make laws in relation to education, subject and according to the following provisions: (1) Nothing in any such law shall prejudicially affect any right or privilege with respect to denominational schools which any class of persons have by law in the Province at the union." Then a second sub-section applies to the Province of Quebec only, and extends to the dissentient schools in that Province, whether Protestant or Catholic, all the powers and privileges that at the union the law of Upper Canada conferred on the separate schools there,



and the third sub-section provides that :—“Where in any Province a system of separate or dissentient schools exists by law at the union, or is thereafter established by the Legislature of the Province, an appeal shall lie to the Governor-General in Council from any act or decision of any provincial authority affecting any right or privilege of the Protestant or Roman Catholic minority of the Queen’s subjects in relation to education.” A fourth sub-section provides that the Parliament of Canada may make remedial laws for the due execution of the provisions of the section and of any decision of the Governor General in Council under it.

The 22nd sect. of the Manitoba Act provides that :—“In and for the Province the said Legislature may exclusively make laws in relation to education, subject and according to the following provisions : (1) Nothing in any such law shall prejudicially affect any right or privilege with respect to denominational schools which any class of persons have by law or practice in the Province at the union. (2) An appeal shall lie to the Governor-General in Council from any act or decision of the Legislature of the Province, or of any provincial authority affecting any right or privilege of the Protestant or Roman Catholic minority of the Queen’s subjects in relation to education,” and a third sub-section is in the same terms as [367] sub-sect. 4 of sect. 93 of the British North America Act. This section of the Manitoba Act was evidently intended to deal with and to cover the whole subject of education in the Province ; and I agree with my brother Killam that the powers conferred by this section cannot be either enlarged or restricted by anything that is in sect. 93 of the British North America Act, and that the provisions of sect. 93 are material in this case, only in so far as they will assist us to arrive at the proper construction of the section of the Manitoba Act. It is evident that the section in the Manitoba Act was based on the 93rd sect. But there are important differences, evidently made with some more or less definite intention ; and a comparison of the two enactments can hardly fail to assist us in seeking to arrive at the intention expressed in sect. 22.

The general power of the Legislature to make laws in relation to education is subject then to the restriction that “nothing in any such law shall prejudicially affect any right or privilege in respect to denominational schools, which any class of persons have by law or practice at the union.” This sub-section differs from the 1st sub-section of sect. 93, in the British North America Act, only by the addition of the words “or practice” ; and as, prior to the union, there were no laws in force in the territory which now

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forms the Province, on the subject of education or schools, denominational or otherwise, the reason of the insertion of the words "or practice" is obvious.

The contention of the applicant is, that Roman Catholics as "a class of persons," had, by practice, prior to the union, certain rights and privileges with respect to denominational schools; and that the Public Schools Act, by establishing a system of free and public schools, and by making all assessable property of Roman Catholics, as well as of all others, liable to be taxed for the support of these schools, prejudicially affects these rights, and that, therefore, the Act is ultra vires and invalid, and that the School Act and the [368] school system it purports to repeal and abolish are still in force. These rights and privileges, that it is claimed Roman Catholics had before the union, by practice, are formulated by the learned counsel for the applicant to be, first, the right to be separate from the rest of the community with reference to education; second, the right to compete on equal terms with other schools; and third, the immunity from contributing to the support of any other schools than their own; and this last is claimed to be rather in the nature of a privilege than a right.

The reason why Parliament made use of the expression a "right or privilege in practice," is more obvious, perhaps, than the precise meaning that should be given to the expression it has used. On the argument, no careful attention was given by any of the learned counsel to the consideration of the meaning of these somewhat vague and indefinite words, but in examining the question raised by the application, it is necessary to fix, as far as possible, and have in mind what is meant by the words, in order to determine if the evidence shews that Roman Catholics, as a "class of persons," had the rights and privileges claimed, or any other rights and privileges, in practice, with respect to denominational schools; and if it appears that they had, then it will be further necessary to inquire if they have been prejudicially affected by the Act in question.

In his affidavit, filed in support of the application, his Grace the Archbishop of St. Boniface states that, prior to the passage of the Manitoba Act there existed in the territory now constituting the Province of Manitoba a number of effective schools for children. These schools were denominational schools, some of them being regulated and controlled by the Roman Catholic Church, and others by various Protestant denominations. The means necessary for the support of the Roman Catholic schools were supplied to some extent by fees paid by some of the children who attended the schools, and the rest was paid out of the funds of the Church con-



tributed by its members. During the period referred to, Roman [369] Catholics had no interest in or control over the schools of the Protestant denominations, and the members of the Protestant denominations had no interest in or control over the schools of the Roman Catholics. There were no public schools in the sense of State schools. The members of the Roman Catholic Church supplied the schools of their own Church for the benefit of Roman Catholic children, and were not under obligation to, and did not contribute to the support of any other schools. His Grace adds :— “In the matter of education, therefore, during the period referred to, Roman Catholics were, as a matter of custom and practice, separate from the rest of the community, and their schools were all conducted according to the distinctive views and beliefs of Roman Catholics as herein set forth.”

The affidavits of Alex. Polson and John Sutherland, filed in reply, merely supplement his Grace's affidavit by stating, “that schools which existed prior to the Province of Manitoba entering confederation were purely private schools, and were not in any way subject to public control, nor did they in any way receive public support. No school taxes were collected by any authority prior to the Province entering confederation, and there were no means by which any person could be forced by law to support any of said private schools.” The affidavits do not shew how these schools were established ; whether the Roman Catholic and the various Protestant denominations, as churches, established the schools and appointed teachers and directly controlled them, or whether they were established by individuals as private enterprises, and were conducted in accordance with the religious views of the denomination to which the individual proprietors belonged and to which they looked for support. However, it is stated that the schools were denominational ones, and that some of them were controlled by the Roman Catholic Church and the others by various Protestant denominations. On these facts then, what “rights or privileges in practice” are Roman Catholics shewn to have had in respect to their school's?

[370] I find myself unable to see how it can be said that they had any *privilege* in respect of their denominational schools in any strict, or even popular, sense of the word “privilege.” It is not shewn, or claimed, that they enjoyed any benefit or advantage in respect of their schools that the various other classes of persons who had established schools did not likewise enjoy in respect of theirs, or that any other individual might not have enjoyed had he chosen to open a school. They were under no obligation,

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indeed, to contribute to the support of the schools of the other denominations, nor for that matter, to contribute to the support of their own schools, but in this respect all other classes of persons, and individuals as well, were precisely in the same position and enjoyed the same immunity; and that which is the common immunity and is the common and equal enjoyment of all cannot properly be said to be a "privilege" of any one person or class.

I may say here that I entirely agree with my brother Killam in holding that the schools that are established by the Public Schools Act are not "denominational" schools. The advisory board is given power to prescribe forms of religious exercises to be used in the schools, but no pupil is required to attend these exercises against the wish of his parents or guardian. The 8th sect. of the Act expressly provides that the schools shall be entirely non-sectarian, and that no religious exercises shall be allowed in them except those prescribed by the advisory board; and we must assume that the board will prescribe forms of religious exercises that shall be entirely non-sectarian. It is a matter of public knowledge that some of the leading and most representative men of some of the Protestant denominations object to these schools, and, as his Grace says in the affidavit, "would like education to be of a more distinctly religious character than that provided for by the said Act." I quite admit, however, that the objection on the ground of the absence of an education that is distinctly religious will be felt much less by Protestants than by Roman Catholics, but I cannot hold that the non-[371] sectarian religious exercises that the Act authorizes, or even that the absence of all religious exercises or teaching in the schools makes, or would make, them Protestant or denominational schools.

It is to be observed, too, that in this sub-sect. 1, Parliament was not thinking only of the two great divisions of Roman Catholics and Protestants, but had in mind and intended to preserve the rights and privileges that other classes of persons besides Catholics or Protestants had, or might have, in respect of denominational schools. This was expressly so held as regards the corresponding sub-section in sect. 93 of the British North America Act, in *Ex parte Renaud* (1), usually known as the New Brunswick school case; and, as the present learned Chief Justice of the Supreme Court said in that case, "We think that the term 'denomination' or 'denominational,' as generally used, is in its popular sense more frequently applied to the different denominations of Protestants than to the Church of Rome; and that the most reasonable inference is that sub-sect. 1 was intended to mean just what it expresses, viz., that 'any,' that is, every

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(1) 1 Pugsley 273; ante vol. 2, p. 445.

'class of persons' having any right or privilege with respect to denominational schools, whether such class should be one of the numerous denominations of Protestants, or Roman Catholics, should be protected in such rights." For an example of the use of the word "denomination" in the sense ascribed to it by the Chief Justice, we have only to turn to paragraph 3 of the affidavit of his Grace the Archbishop, where he speaks of some of the schools having been "controlled by the Roman Catholic Church and others by various Protestant denominations."

A recent learned writer on jurisprudence (Holland, *Elements of Jurisprudence* 4th Ed., 70) has defined a "legal right" as "a capacity residing in one man of controlling with the assistance of the State, the action of others." But from the circumstances of the case, as well as from the addition of the words "by practice" to the sub-section as it is in the British North America Act, it is evident, I think, that Parliament intended that the sub-section in [372] the Manitoba Act should apply to other rights than legal ones. At page 69, the author, whose definition of a "legal right" I have given, says:—"When a man is said to have a right to do anything, or over anything, or to be treated in a particular manner, what is meant is that public opinion would see him do the act, or make use of the thing, or be treated in that particular manner, with approbation, or, at least, with acquiescence; but would reprobate the conduct of anyone who should prevent him from doing the act, or making use of the thing, or should fail to treat him in that particular way. A 'right' is thus the name given to the advantage a man has when he is so circumstanced that a general feeling of approval, or at least of acquiescence, results when he does or abstains from doing certain acts, and when other people act or forbear to act in accordance with his wishes; while a general feeling of disapproval results when anyone prevents him from so doing or abstaining at his pleasure, or refuses to act in accordance with his wishes." A "right" in this sense is nothing more than a "moral right," and Professor Holland so terms it and distinguishes it from a "legal right." In the case of *Fearon v. Mitchell* (1), to which the Chief Justice has called my attention, the Court in construing a section that provided that no market should be established "so as to interfere with any rights, powers or privileges enjoyed within the district by any person, . . . without his consent," held that the word "rights," especially when taken in conjunction with the words "powers or privileges," must mean rights acquired adversely to the rest of the world, and peculiar to the individual,

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and did not apply to a right which an individual enjoyed in common with the rest of Her Majesty's subjects. Had the words "right or privilege" stood alone in the sub-section, this is doubtless the only meaning that could have been properly given to them, but from the addition of the words "by practice," and from the state of circumstances in reference to which Parliament was legislating, I am disposed to think the words were used in their widest [373] signification, and that the "rights" that Parliament had in view were in the nature of those that Professor Holland describes as "moral rights." What was meant, then, by the sub-section was, I think, that nothing in any law to be passed by the Legislature relating to education was to prejudicially affect anything that any class of persons had been in fact, and generally in the habit of doing with respect to denominational schools, with the acquiescence, implied or expressed, of the rest of the community. A view of the meaning of the sub-section more favourable to the contention of the applicant cannot possibly be taken.

The affidavits shew that before the union, private schools regulated and controlled by the Roman Catholic Church, had been established and maintained. These schools are properly termed denominational schools, and they were, it is to be inferred, established and maintained with the acquiescence of the rest of the community. If then I am not giving too wide a meaning to the term "right or practice," it must be held that it has been established that Roman Catholics had the right to establish and maintain denominational schools, and, of course, to attend them, or send their children to them, if they saw fit.

From the fact that there were these denominational schools, and that they were all conducted according to the distinctive views and beliefs of Roman Catholics, Roman Catholic parents would naturally send their children to these schools rather than to those which were conducted by the various Protestant denominations, which also, we may assume, were conducted according to the distinctive religious views of the denominations that controlled them; and the deduction of his Grace the Archbishop is doubtless entirely correct when he says, in the 6th paragraph of his affidavit, that, "in the matter of education, therefore, during the period referred to, Roman Catholics were as a matter of custom and practice, separate from the rest of the community." But this, it seems to me, falls far short of establishing that Roman Catholics had a distinct and positive right to be separate in matters of education; and to [374] say that they were thus more or less separate, is only to say in other words that they had the right to maintain denominational



schools and send their children to them if they saw fit. Their being separate was only an incident of their right to maintain the schools.

The other right that the counsel for the applicant claims that Roman Catholics had at the union by practice, was the right to compete on equal terms with Protestants in maintaining their denominational schools. All the schools were private enterprises, and all were upon the same footing and competed for the support of the public on equal terms, as far as any influence external to the class of persons who controlled the schools was concerned, and no one will question the correctness of the proposition advanced. The different schools had the right to compete with one another on equal terms, just as we might say that a merchant or tradesman has the right to compete with other merchants or tradesmen on equal terms. But this proposition seems to have been advanced with the idea that the schools established under the Public Schools Act are denominational or Protestant schools ; and on this point I have already expressed my opinion.

It will be admitted that it is the imperative duty of every State or civil government to provide means by which, at all events, elementary and ordinary education shall be placed within the reach of every child in the community. It is recognised that it is a danger to the State that any portion of its citizens should grow up in ignorance, and that a State is justified in imposing taxation to provide means by which this danger will be prevented or lessened. Under the constitution of this Province, the power to make laws in relation to education has been given exclusively to the Provincial Legislature. To it has also been given the power to impose taxation for provincial purposes ; and in giving these powers Parliament clearly contemplated and intended that some system of public instruction and education would be provided by the Legislature, and that, as far as should be found necessary, taxation would be imposed [375] to provide and support such a system. The power of the Legislature to make laws in relation to education was made subject only to one qualification or restriction, that nothing in such laws should prejudicially affect any right or privilege with respect to denominational schools which any class of persons had by law or practice in the Province at the union. The Legislature has by the Act in question provided for the establishment of a system of public, free, and non-sectarian or undenominational schools, at which every child in the Province can attend, and has made all taxable property in the Province liable to be taxed for the support of these schools. No one, however, can be compelled to attend

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these schools if he does not wish to, and there is nothing in the Act that will in any way prevent any person, or class of persons, from establishing schools that shall be strictly denominational, and from competing on equal terms with other denominational schools that may be established. The right then that Roman Catholics had before the union to establish denominational schools and to attend them, and to compete, as regards their schools, on equal terms with other denominations, or Protestants generally, has not been taken away, and can be exercised now as fully as it could have been before the union. The attendance at these schools, it is true, may be prejudicially affected by the competition of the free public schools established under the Act, in the same way that the business of a merchant, who has a right to carry on business, may be affected by another merchant opening a store in the exercise of a similar right, but the right itself is as little affected in the one case as in the other. Nor do I think these rights in respect of denominational schools or any other right or privilege that on the evidence could possibly be claimed, can be said to be prejudicially affected by the fact that the property of Roman Catholics, in common with the property of everyone else, is made liable to be taxed in support of the public undenominational schools that the Act establishes. No right in respect to such schools is affected by [376] this taxation ; the taxation to support these public schools is for a provincial purpose, and if Roman Catholics, as is said, are less able to support their denominational schools by whatever amount of taxes they have to pay to the public schools, the same may be said of any other tax that is imposed by the Legislature for provincial or municipal purposes. On the question of what is meant by the expression, "prejudicially affect any right," the judgment of the Court in the New Brunswick school case, in which the Court had to consider the effect of these words in the section of the British North America Act, is instructive.

The Parish Schools Act of New Brunswick, which was in force in that Province when the Province entered confederation, secured to all children whose parents did not object, the reading of the Bible in the parish schools, and expressly provided that the Bible, when read in the parish schools by Roman Catholic children, should, if required by parents, be the Douay version, without note or comment. But the Common Schools Act, 1871, which repealed the Parish Schools Act, omitted this provision, and declared that all schools conducted under its provisions should be non-sectarian, and the Board of Education, under the powers given to it by the Act, made the regulation that, "it shall be the privilege of every teacher



to open and close the school by reading a portion of scripture (out of the common or Douay version, as he may prefer), and by offering the Lord's Prayer." It is evident, therefore, that the Roman Catholics were thus placed in a very different position as regards the actual enjoyment of the right or privilege they had to insist that the Douay version should be read to their children, from that they were in before the passing of the Common Schools Act, but the Court held, that if this were a right or privilege in respect of denominational schools within the meaning of the sub-section, it was not taken away, although it was not protected by any express enactment, and that, therefore, the right could not be said to have been prejudicially affected so as to make the Act invalid.

[377] But, it is said, Roman Catholics do not claim that the effect of the sub-section is to render them and their property for ever exempt from taxation for the support of public schools, and they admit that they are liable and willing to be taxed for the support of Roman Catholic public schools as they were under the school system that the present Act has abolished; and the principal part of the persuasive argument of the counsel for the applicant was devoted to an endeavour to shew that, having regard to the history of the controversy with respect to denominational schools in the older Provinces, Parliament could have intended nothing else by the provisions of sect. 22 than to confirm to Roman Catholics in Manitoba the same rights and privileges in regard to separate schools that had been won for the minority in Upper Canada, and that were not only confirmed to Ontario, but were extended to Quebec by sub-sect. 2 of sect. 93 of the British North America Act, and that the Court should give effect to what we must thus assume was the intention and policy of Parliament. It is urged, too, that if sub-sect. 1 is to have no more effect than to preserve the right to maintain denominational schools, it is useless and inoperative, and that Parliament would never have thought it worth while to make an enactment merely to preserve this right, as it cannot be supposed that any Legislature would ever think of taking it away. It is satisfactory to find, under the circumstances, that there is still this confidence on the part of the applicant in the fairness and liberality of those who may from time to time form the majority of the Legislature, but, admitting that his confidence is well founded, and that the sub-section will never be required to preserve the right in question, it does not follow that it must be given the wider operation contended for.

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It is, of course, necessary for anyone who is interpreting and construing a statute to make himself acquainted, as far as he can, with the history of the enactment and the external circumstances which led to its being passed, so that he may be so far in the place [378] of those whose words he is interpreting that he can see what the words they used relate to. But "the external circumstances which may thus be referred to, do not however justify a departure from every meaning of the language of the Act. Their function is limited to suggesting a key to the true sense, when the words are fairly open to more than one, and they are to be borne in mind, with the view of applying the language to what was intended and of not extending it to what was not intended" (1). And, as Sir William Ritchie said in *Ex parte Renaud* (2), "It is a well established canon of construction, that an Act is to be construed according to the ordinary and grammatical sense of its language, if precise and unambiguous; and, it is likewise a rule, established by the highest appellate authority, that the language of a statute, taken in its plain, ordinary sense, and not its policy or supposed intention, is the safer guide in construing its enactments." The question for a Court always is, not what Parliament meant, but what its language means.

But, looking at the history of the controversy in regard to separate schools, and at all the external circumstances that we are asked to consider, it is very far from clear to my mind that Parliament meant anything more by the provisions of sect. 22 than the language that it used naturally expresses. It will occur to everyone that, had it been the intention to give and confirm to Roman Catholics, or any other class of persons in the new Province, the right to have separate schools, and the immunity from supporting any but their own schools, the right would have been given in explicit terms. It was well known what agitation and bitter ill-feeling the question had caused in Upper Canada before it was settled; and if Parliament had intended to settle it once for all for Manitoba, I find it impossible to think that, with the provisions of the British North America Act that settled it for Ontario, and Quebec before it, and from which sect. 22 was adapted, it would not have inserted a similar express provision in the Manitoba Act. But it [379] has not done so, and the inference I would draw from these external circumstances, as well as from the language of the section, is that Parliament intended to leave the question to be settled by the people of the Province themselves, as it had been by the people of the Provinces, in which a settlement had been arrived at,

(1) Maxwell on Statutes, p. 32. (2) 1 Pugsley 273; *ante* vol. 2, p. 445.

making only the natural and just restriction, that existing rights in respect of denominational schools should not be prejudicially affected by any laws that the Legislature should make. As we have seen, "various Protestant denominations" were exactly in the same position as regards denominational schools as Roman Catholics were, and if Roman Catholics can claim the right to have separate schools and to support only their own schools, so can each one of these Protestant denominations. But in the absence of any express and explicit enactment to this effect, it is hard to believe that it could have been the intention or policy of Parliament to impose such a state of affairs upon the new Province.

The Act of the Legislature that we are asked to hold to be unconstitutional and invalid is one that deals with a subject over which the Legislature, by the constitution of the Province, has been given exclusive jurisdiction, subject only, as far as the Courts are concerned, to the one restriction or limitation that the laws to be made by the Legislature shall not prejudicially affect these rights in respect of denominational schools. With the policy of the Legislature the Court has nothing to do, and in dealing with such cases the presumption of the Court should always be, I think, in favour of the constitutionality of the Act in question; and in this case the Court should not undertake to declare the Act invalid, unless it is established beyond reasonable doubt that the Legislature has exceeded its jurisdiction by contravening and infringing upon this restriction or qualification. The rule that I have indicated is the one that is followed in the Supreme Court of the United States, and on this subject I cannot do better than adopt the language of Chief Justice Marshall in *Fletcher v. Peck* (1), "The question," he [380] says, "whether a law be void for its repugnancy to the constitution is at all times a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative in a doubtful case. The Court, when impelled by duty to render such a judgment, would be unworthy of its station could it be unmindful of the solemn obligations which that station imposes. But it is not on slight implication and vague conjecture that the Legislature is to be pronounced to have transcended its powers, and its acts to be considered as void. The opposition between the constitution and the law should be such that the Judge feels a strong and clear conviction of their incompatibility with each other."

I think my brother Killam was right in dismissing the application to quash the by-laws, and I agree with the Chief Justice that this application should be dismissed with costs.

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JUDGMENT OF KILLAM, J. (*before whom the case came in the first instance.*)

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KILLAM, J. :—

By the Manitoba School Act passed in 1881, 44 Vict., 3rd sess., c. 4, and the previous Statutes of this Province, the public schools were under the control of a body known as the Board of Education, divided into two sections, composed respectively of the Protestant and Roman Catholic members of the board and two superintendents, one being taken from each section of the board. Under the various statutes enacted from time to time provisions were made for the formation in different ways of school districts under the control of the different sections of the board and the corresponding superintendents. The system which finally prevailed was first adopted in 1875 by the Act 38 Vict. c. 27, M., but various amendments in details were made from time to time. The last complete Act was that of 44 Vict., of which amendments are found in the statutes of nearly every year previous to 1890. Under this legislation the school districts were directly governed by school trustees elected respectively by Protestant and Roman Catholic ratepayers who constituted in each district a body corporate known finally as "The School Trustees for the Protestant—or Catholic, as the case might be,—School District of                      number                      in the Province of Manitoba." See 38 Vict. c. 27 ; 42 Vict. c. 2; C. S. M. c. 62 ; 44 Vict., 3rd sess., c. 4 ; 48 Vict. c. 27, s. 23. These school districts, Protestant and Catholic respectively, were wholly independent of each other, and might cover the territory wholly or partially. In cases of incorporated cities and towns the respective districts of each denomination were usually co-terminous with the cities or towns themselves. See 44 Vict. c. 4, s. 15 ; 47 Vict. c. 37, s. 4 ; 47 Vict. c. 54, s. 2.

[283] With the exception of some limited rates charged to non-residents having children attending the schools, the moneys for the support of schools were derived partly from grants by the Legislature of provincial moneys, and partly by direct taxation levied by the trustees themselves or by the municipal officers, or partly by each.

The sums granted by the Legislature were apportioned between the two sections of the board of education for distribution by them among their respective schools. Provision was made to secure the levying of the taxes for the support of the schools in the Protestant school districts upon the property of Protestants alone, and in Roman Catholic districts upon that of Roman Catholics alone, with



an apportionment between them of taxes upon the property of corporations and of those persons who could not be considered to belong to either body. *See* 44 Vict. 3rd sess., c. 4, ss. 28, 30, 31, 32; 47 Vict. c. 37, s. 11.

One method of realizing by assessment was the submission by the trustees of a school district to the council of the municipality in which the district was situate, of an estimate of the sums required by such trustees for school purposes during the current school year, the municipal council being required to levy and collect the sums by assessment upon the real and personal property in the district of the Protestants and Roman Catholics respectively. *See* 44 Vict. c. 4, ss. 25, 27, 28, 30, 31, 32; 46 & 47 Vict. c. 4, s. 8; 47 Vict. c. 37, ss. 8, 10, 11; 48 Vict. c. 27, s. 9, sub-ss. (a), (f), s. 10, sub-s. (d), s. 17, sub-s. (d); 50 Vict. c. 18, ss. 7, 8.

By sect. 182 of the Public Schools Act, 53 Vict. c. 38, M., all of these former statutes were repealed, and by that and the next preceding Act, c. 37, the Legislature assumed to establish an entirely different system. A department of education was created to consist of the executive council or a committee thereof with certain prescribed powers in reference to education, and provision was also made for the election and appointment of an advisory board [284] with certain defined functions. Approximately it may be said that these bodies took the place of the old Board of Education.

By sect. 3 of the Public Schools Act "all Protestant and Catholic school districts, together with all elections and appointments to office, all agreements, contracts, assessments, and rate bills heretofore duly made in relation to Protestant or Catholic schools, and existing when this Act comes into force, shall be subject to the provisions of this Act."

By sect. 4 the term for which each school trustee held office was to continue as if created under the Act. By sect. 86, subsect. 5, the board of school trustees in cities, towns, and villages is "to prepare from time to time and lay before the municipal council of the city, town, or village on or before the first day of August, an estimate of the sums which they think requisite for all necessary expenses of the schools under their charge."

By sect. 90 the council of every rural municipality is to levy on the taxable property in each school district the sum required by such district in addition to the legislative grant and a general municipal levy provided for by the 89th section.

By sect. 92 the municipal council of every city, town, and village is to "levy and collect upon the taxable property within the muni-

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cipality in the manner provided in this Act and in the Municipal and Assessment Acts, such sums as may be required by the public school trustees for school purposes."

By sect. 93 the taxable property in a municipality for school purposes is to include all property liable to municipal taxation, and also all property exempted by the council from municipal and not from school taxation.

By sect. 179, in cases where, before the coming into force of the Act, Catholic school districts had been established, covering the same territory as any Protestant school districts, such Catholic school districts were upon the coming into force of the Act to cease [285] to exist. By sect. 183 the Act was to come into force on the 1st day of May, 1890.

By sect. 5 "all public schools shall be free schools." By sect. 6 "religious exercises in the public school shall be conducted according to the regulations of the advisory board," with provision for excusing the attendance upon such exercises of any child whose parent or guardian may so desire. By sect. 8 "the public schools shall be entirely non-sectarian, and no religious exercises shall be allowed therein, except as above provided."

It is shewn that on and prior to the 30th April last, a school district which had some years before been established, existed in the city of Winnipeg, and that such district was under the direction and management of the corporation known as "The School Trustees for the Catholic School District of Winnipeg, No. 1, in the Province of Manitoba," that this corporation had established and in operation a number of schools in Winnipeg under the provisions of the various Provincial Statutes relating to schools, to one of which the applicant has been in the habit of sending his children for instruction; that this latter school is still continued with the same teaching and religious exercises as previously, and the applicant's children still attend it.

While it is to be noted in this connection that it does not appear under what authority this particular school is now conducted, or whether the teaching and religious exercises referred to are warranted by the regulations, if any, of the advisory board, I do not think that anything turns upon these points. It also appears that, on the 28th of April last, there were presented to the clerk of the city of Winnipeg, an estimate and requisition in writing of "The Board of School Trustees for the Protestant School District of Winnipeg, No. 1, in the Province of Manitoba," for the levy and collection by the city council of \$75,000 for the school year 1890, accompanied by a list of the names of those liable to be assessed for



[286] the support of Protestant schools, and that, on the 29th of April last, a similar estimate and requisition were submitted on behalf of the "School Trustees of the Winnipeg Catholic School District," for the levy of \$2,550 for the support of their schools for the year 1890, with a list of names of persons liable to assessment for the same. It is shewn that these estimates and requisitions were submitted to and approved by the city council, and are those on which the by-laws, in so far as they impose a rate for school purposes, are based. It is not contended that if the Public Schools Act is valid and in force it was improper to levy a rate based on these estimates alone.

The contention of the applicant is, that the old law is still in force, and that the amounts of these estimates should have been levied separately upon Protestant and Roman Catholic ratepayers. The argument for this view is based upon a claim that the Public Schools Act of 1890 is ultra vires of the Provincial Legislature, and that the repeal of the former Statutes was intended to operate only for the purpose of substituting the one system for the other, and should be deemed inoperative. It is sufficient, however, for present purposes to consider whether it was intra vires of the Legislature to establish such a system of schools as is provided by the new Act, and to authorize the raising of money for their support by a general assessment upon the property of all, irrespective of religious belief, and without providing for the support of separate schools for any class.

I have referred to the old Acts as shortly as possible, rather in order to explain the form of the objection taken in the summons and as illustrative of one system which the applicant contends to have been within the powers of the Legislature, to establish, than because I can conceive that the adoption at one time of such a system could limit the authority of the Legislature thereafter.

By sect. 2 of the Statute, usually known as the Manitoba Act, 33 [287] Vict. c. 3, D., confirmed by the Imperial Act, 34 & 35 Vict. c. 28, the provisions of the British North America Act, 1867, "Except those parts thereof which are in terms made, or by reasonable intendment may be held to be specially applicable to, or only to affect one or more, but not the whole of the Provinces" then composing the Dominion, and except so far as the same might be varied by the Manitoba Act itself, were to "be applicable to the Province of Manitoba in the same way and to the like extent as they apply to the several Provinces of Canada, and as if the Province of Manitoba had been one of the Provinces originally united by the said Act."

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By the British North America Act, 1867, sect. 92, "In each Province the Legislature may exclusively make laws in relation to matters coming within the classes of subjects next hereinafter enumerated, that is to say," . . . "(2) Direct taxation within the Province in order to the raising of a revenue for provincial purposes" . . . "(8) Municipal institutions in the Province." And by sect. 93, "In and for each Province the Legislature may exclusively make laws in relation to education, subject and according to the following provisions :—(1) Nothing in any such law shall prejudicially affect any right or privilege with respect to denominational schools which any class of persons have by law in the Province at the union. (2) All the powers, privileges, and duties at the union by law conferred and imposed in Upper Canada on the separate schools and school trustees of the Queen's Roman Catholic subjects shall be, and the same are hereby extended to the dissentient schools of the Queen's Protestant and Roman Catholic subjects in Quebec. (3) Where in any Province a system of separate or dissentient schools exists by law at the union, or is thereafter established by the Legislature of the Province, an appeal shall lie to the Governor-General in Council from any act or decision of any provincial authority affecting any right or privilege of the Protestant or Roman Catholic minority of the Queen's subjects in relation to education." A fourth sub-section provides for the [288] enactment by the Parliament of Canada, so far as may be necessary, of laws requisite to the carrying out of the decision on such appeal.

By sect. 22 of the Manitoba Act, "In and for the Province the said Legislature" (*i.e.*, the Provincial Legislature) "may exclusively make laws in relation to education, subject and according to the following provisions :— (1) Nothing in any such law shall prejudicially affect any right or privilege with respect to denominational schools which any class of persons have by law or practice in the Province at the union. (2) An appeal shall lie to the Governor-General in Council from any act or decision of the Legislature of the Province, or of any provincial authority, affecting any right or privilege of the Protestant or Roman Catholic minority of the Queen's subjects in relation to education." A third sub-section is added similar to sub-sect. 4 of sect. 93 of the British North America Act.

Now it is obvious that if there were merely the authority to legislate in relation to education without the limitations imposed by these sub sections, it would be quite competent for the Provincial Legislature to enact such a statute as the Public Schools Act.

It is in the sub-sections that the difficulty lies. It appears to me that these sub-sections can only be properly understood by a comparison of them with the corresponding limiting sub-sections of the British North America Act, 1867, and by a consideration of the laws of the four original Provinces of the Dominion, at the time of their union, as well as that of the law and practice with reference to education in this portion of British North America, at the time of its union with Canada. In each of the Provinces originally united to form the Dominion of Canada, there existed at the union a system of public schools supported, partly by grants of money by the Provincial Legislature out of the general funds of the Province, and partly by direct taxation through municipal bodies or boards of school trustees or commissioners, with, in Lower Canada and New [289] Brunswick, an option to localities to substitute voluntary subscriptions for compulsory taxation. There was, however, this difference, that in Nova Scotia and New Brunswick there was no provision for the support of separate schools for any class in a similar way, or for the exemption of any class from liability to be taxed for the support of the general system, as there was in the old Province of Canada.

Of the latter Province there were, as is well known, two great political divisions, at one time forming separate Provinces for which the laws in some respects differed. In Upper Canada, now the Province of Ontario, the public schools were regulated by the Acts Con. Stat. U. C., cc. 64, 65, with some amendments, the most important of which were contained in the Act 26 Vict. c. 5. By the second of these Acts Protestants could establish separate schools in school sections in which the teachers of what were called the common schools were Roman Catholics, and were then exempted from contributing to the support of the common schools, by sending their children to, or contributing to a certain extent, to the support of such separate schools. And by the same Act, as amended by the third one mentioned, similar provision was made for enabling the Roman Catholics in any school section to establish separate schools for themselves, and to become exempt from contributing to the support of the common schools, as long as they should continue to be supporters of such separate schools. For the purposes of these separate schools, Protestant or Roman Catholic, it was requisite that there should be a certain number of the particular religious faith to initiate the proceedings necessary to the establishment of such separate schools.

In Lower Canada, now the Province of Quebec, the public schools were regulated by the Act, Con. Stat. L. C., c. 15, with some

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amendments. If the rules and regulations for the government of a common school were not satisfactory to any number of the inhabitants of a municipality professing a religious belief different from that of the majority, these inhabitants could establish dissentient schools under the government of their own trustees, and become exempt from taxation for school purposes by any but these trustees where there were such.

Both in Upper and Lower Canada the supporters of the separate or dissentient schools were by express enactments entitled to have proportionate shares of provincial moneys granted for the support of common schools, applied in aid of such separate or dissentient schools, and to have rates levied for the support of the latter upon those of the appropriate classes respectively.

In Nova Scotia the schools were regulated by the Acts Rev. Stat. N. S. (3rd series) c. 58 ; 28 Vict. cc. 28, 29 ; 29 Vict. c. 30 ; and in New Brunswick by the Act 21 Vict. c. 9, in each case with some subsequent unimportant amendments. Upon the face of the statutes, it is clear that in Nova Scotia these schools were not in any respect denominational in the usual sense of that term. For New Brunswick any possibility of contention that they were denominational in the sense in which that term is used in the British North America Act, 1867, is precluded by the decision of the Supreme Court of New Brunswick, in *Ex parte Renaud* (1), affirmed on appeal by the Judicial Committee of the Privy Council. The reasoning in this case would also seem to apply to the common schools of Upper Canada. In Lower Canada an element of a denominational character, not found in the other Provinces, was attached to the common schools in a requirement that the text-books relating to religion and morals were to be chosen by the officiating priest or clergyman of each school section, for use in the schools by children of his religious belief. See Con. Stat. L. C., c. 15, s. 65, sub-s. 2.

From the judgments in the New Brunswick case referred to, it appears also that at the union there existed in that Province distinctively denominational schools, to which the Provincial Legislature had from time to time made grants of public moneys. The [291] same was also, to some extent, the case in Nova Scotia, and I believe in the old Province of Canada.

There were then two wholly different sets of circumstances existing in Canada and the Maritime Provinces when they were united, to which the limitations in the sub-sections of sect. 93 of the confederation Act became applicable. In the former there were what I conceive to have been denominational schools recognised by law.

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(1) 1 Pugsley 273 ; ante vol. 2, p. 445.



the supporters of which could invoke the authority of the law to maintain them by compulsory assessments upon their co-religionists, and could, by so doing, relieve themselves from liability to assessment for the support of the common schools, and were by law entitled to have apportioned to them a share of the provincial funds granted in aid of common schools. Thus there were distinct classes of persons having distinct rights and privileges in respect of denominational schools among which was that of obtaining immunity from taxation for the support of the common schools. This immunity could well be said to be a right or privilege in respect of denominational schools, as being dependent upon the establishment and support of such schools.

In the Maritime Provinces all could be compelled to contribute to the support of the public schools by direct taxation without reference to religious beliefs or the existence of denominational schools and there was no recognizable right to have the latter maintained in any way at the public expense, or by any system of taxation.

When, however, we come to Manitoba, we are met at the outset by the difficulty that there was no public school system supported by public funds, or by any mode of taxation. The existence of such in the other Provinces served to determine whether there was a right to immunity from such taxation or not. Here, that indication is wholly wanting.

The position of affairs with reference to education in the territory constituting the Province of Manitoba at the time of its union with [292] Canada, is distinctly stated by his Grace the Archbishop of St. Boniface, in an affidavit filed in support of the motion, as follows: "2. Prior to the passage of the Act of the Dominion of Canada passed in the thirty-third year of the reign of Her Majesty Queen Victoria, chapter three, known as the Manitoba Act, and prior to the Order in Council issued in pursuance thereof, there existed in the territory now constituting the Province of Manitoba a number of effective schools for children. 3. These schools were denominational schools, some of them being regulated and controlled by the Roman Catholic Church, and others by various Protestant denominations. 4. The means necessary for the support of the Roman Catholic schools were supplied to some extent by school fees paid by some of the parents of the children who attended the schools, and the rest was paid out of the funds of the Church contributed by its members. 5. During the period referred to, Roman Catholics had no interest in, or control over, the schools of the Protestant denominations, and the members of the Protestant

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denominations had no interest in, or control over, the schools of the Roman Catholics. There were no public schools in the sense of State schools. The members of the Roman Catholic Church supported the schools of their own Church for the benefit of Roman Catholic children, and were not under obligation to, and did not contribute to the support of, any other schools. 6. In the matter of education, therefore, during the period referred to, Roman Catholics were, as a matter of custom and practice, separate from the rest of the community, and their schools were all conducted according to the distinctive views and beliefs of Roman Catholics as herein set forth.

And in two affidavits filed in opposition to the motion it is stated, "That schools which existed prior to the Province of Manitoba entering confederation, were purely private schools, and were not in any way subject to public control, nor did they in any way receive public support. No school taxes were collected by any authority prior to Manitoba entering confederation, and there were [293] no means by which any person could be forced by law to support any of said private schools."

While, then, these supplement to some extent the affidavit of his Grace, they are in no way inconsistent with it; and taken altogether the affidavits shew with sufficient clearness, the state of affairs with reference to which sect. 22 of the Manitoba Act must be construed.

Now, that section differs from the corresponding section of the original confederation Act in four particulars; first, in the insertion in the first sub-section of the words "or practice" to which so much importance has been attached in argument; secondly, in the omission of any clause corresponding to the second sub-section of the original Act; thirdly, in the extension of the right to appeal to the Governor-General in Council to acts or decisions of the Provincial Legislature; and fourthly, in the right of appeal being given absolutely and not conditionally upon the previous existence or subsequent establishment of a system of separate or dissentient schools.

And here, I must say with reference to an argument that the third sub-sect. of sect. 93 of the original Act is one applicable to the whole of the Provinces of the Dominion, and therefore, by the terms of the second section of the Manitoba Act, to be read into the latter Act, in addition to sect. 22 of the latter, that this 22nd sect. gives power to the Legislature to make laws in relation to education, subject and according to certain provisions, and that if the reading into the Act of any portion of the original sect. 93 would involve either an extension or a limitation of the powers of the Provincial



Legislature beyond those fixed by the terms of this 22nd sect. there would be an inconsistency with the Manitoba Act, which is excluded by the express terms of its second section. The course of the legislation and the meaning of the first statute, are of the greatest importance in interpreting the second, but I cannot consider any portion of the 93rd sect. of the former to be incorporated into the second Act.

The first question naturally arising is, as to whether the Public [294] Schools Act itself creates a system of denominational schools, or assumes to compel any class to support denominational schools other than their own. Upon the face of the statute it does not. The affidavit of his Grace the Archbishop, however, appears to be intended to lay a foundation for an argument, that what are called in this Act "Public Schools," are really schools of a Protestant denominational character, although the Act upon its face declares that they are to be unsectarian.

After setting forth the importance which Roman Catholics attach to the combination of religious with secular instruction ; the use of religious exercises in the schools ; the supervision of the Church over the schools ; the training of their children in the doctrines and faith of their Church ; the appointment of teachers who are not only members of that Church, but also thoroughly imbued with its principles and faith, and who recognise its spiritual authority and conform to its direction and the use of a certain class of text-books, he goes on to say, that the Church regards the schools provided for by the Public Schools Act "as unfit for the purpose of educating their children and the children of Roman Catholic parents will not attend such schools," but that "Protestants are satisfied with the system of education provided for by the said Act, and are perfectly willing to send their children to the schools established and provided for by the said Act ;" that "such schools are, in fact, similar in all respects, to the schools maintained by the Protestants under the legislation in force immediately prior to the passage of the said Act." He then proceeds : "The main and fundamental difference between Protestants and Roman Catholics with reference to education is, that while many Protestants would like education to be of a more distinctly religious character than that provided for by the said Act, yet they are content with that which is so provided, and have no conscientious scruples against such a system ; the Catholics, [295] on the other hand, insist upon education being thoroughly permeated with religion and religious aspects."

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In so far as there is any material in reply to this affidavit, it does not appear to be contradicted. Indeed, it seems rather to be supported upon material points as regards the adherents of the Presbyterian Church by the affidavit of the Rev. Dr. Bryce.

Here, however, I cannot conceive myself to be bound by, or confined to affidavit evidence. I am interpreting statutes, and in so doing I am at liberty to take judicial notice of the circumstances with respect to which they are to be construed. I do not say this because I conceive that there is anything really untrue or intended to mislead or to give a false colouring to beliefs in any of the affidavits. Indeed they appear to me to offer in most respects a very fair view of the relative attitudes of most Protestants on the one side, and most Roman Catholics and the Roman Catholic Church as a body on the other side. I am not, however, convinced that there is any such distinctive difference between Protestants generally and Roman Catholics generally upon this question, as to constitute a mark of denominational division and to make what would ordinarily be termed non-denominational schools, really "denominational" within the meaning of the Manitoba Act as between Protestants and Roman Catholics.

From my experience I would say that very many Protestants have as strong opinions upon the importance of combining religious with secular instruction as any Roman Catholics. In support of this view, I need only refer to the report of the Royal Commission, appointed in 1886, to inquire into the working of the Elementary Education Act in England and Wales.

The difficulty lies in arriving at any agreement upon the nature and extent of the religious training, and securing that it shall be satisfactorily conducted.

To insure the latter, most Roman Catholics, and very many Protestants, desire to have the education of the young conducted in [296] denominational schools under the control of those connected with their respective churches. The evidence of this is found in the existence and maintenance of just such denominational schools wholly apart from institutions of a collegiate character to which reference was made in *Ex parte Renaud* (1), and which are maintained by Protestants and attended by children of Protestants in all parts of Canada as elsewhere.

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(1) 1 Pugsley 273 ; ante vol. 2, p. 445.

The question whether wholly, or how far the public schools should be devoted to secular training is a grave one, upon which I have not now to express an opinion, but it is impossible not to see that there is much reason to believe that the non-sectarian system tends to the exc'usion from the schools of the religious instruction, to which so many naturally attach the greatest importance: or to make the religious exercises and training conform to the views of the majority in the State. But if the school authorities act improperly, or without proper judgment, religious exercises and training as offensive to many Protestants as to any Roman Catholics may find their way into the schools.

The controversy is an old one, and its whole history appears to shew that it is one between denominational and non-denominational schools, and that those established under the Public Schools Act are not denominational in the sense of that controversy, or of the Manitoba Act, or the British North America Act, 1867, which must be deemed to speak with reference to that controversy.

These views are supported by the judgment in the New Brunswick case before referred to, the argument in which I shall not now delay to repeat. I am not aware of the existence of any extended report of the opinions of the Judicial Committee of the Privy Council in that case. The only reference to the appeal that I have seen is that found in 2 Cartwright's Cases on the B. N. A. Act, at page 436, which purports to have been taken from the London Times of the 18th of July, 1874, and which states merely that "Lord Justice James, after conferring with the other members of the Committee, gave judgment without calling upon the respondents," and that "their Lordships concurred in the opinions of the Court below, and would advise Her Majesty that the appeal be dismissed with costs."

Now, the rights and privileges protected by the first sub-section are those with respect to denominational schools which some class or classes of persons had before the union.

I have shewn how it may be said that the right to obtain immunity from taxation for the support of the common schools, in the old Province of Canada, could be said to be a right or privilege with respect to denominational schools, and to have been possessed by classes of persons. It is to be noticed that it was enjoyed, not as directly dependent upon belief in denominational schools as the

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only proper system, or upon support of any but the State system of separate or dissentient schools, and only if such should be established and kept up, which, if there were not sufficient of the requisite religious views or desirous of maintaining them could not by law be done in Upper Canada or in practice in either portion of the Province.

But under the state of affairs existing here before the union with Canada, there was simply an absence of any law requiring any person to contribute to the support of schools. It was not dependent upon or connected with denominational schools, and cannot be said to have been either by law or practice a right or privilege with respect to denominational schools.

But it is necessary to consider whether the Public Schools Act in consequence of its effect upon denominational schools themselves, or the practice of establishing, maintaining, and having their children educated in denominational schools, which is shewn to have been exercised by certain classes before the union, prejudicially affects any right or privilege in respect of such schools which these classes had at the union.

The Act in no way prohibits attendance upon or the maintenance of denominational schools, or attempts to make attendance upon the public schools compulsory ; it is, however, suggested that the [298] Act prejudicially affects such rights or privileges in two ways, First, by establishing in competition with the denominational schools a system of free schools supported by the public funds, and thereby placing the denominational schools at a great disadvantage ; and, secondly, by withdrawing from the hands of those who would be desirous of supporting denominational schools funds which they would otherwise devote to that purpose.

While in practice, the denominational schools existing before the union were not subject to the competition referred to, it was quite competent for any person or persons desirous of doing so to establish and maintain non-denominational schools free or otherwise. By right or privilege, I cannot conceive that mere absence, in fact, of something which would render another thing less valuable is meant. The argument is really a plea for the monopoly of educational privileges by certain institutions or bodies or by institutions or by bodies of a certain character. To such a monopoly there was no recognised right or privilege, either by law or practice. If there



was no right to be free from competition there was none such to be free from the competition of free schools or of those supported by the State. The circumstances existing in the older Provinces, and the general nature of the school systems in America, suggest at once that it must have been contemplated in the enactment of the Manitoba Act that the Legislature of Manitoba should be at liberty to establish a system of free non-denominational public schools, and provide for their support by grants of provincial funds or direct taxation or by both methods. Under the powers given, it would be open to the Legislature to make laws to encourage or to restrict education, provided the protected rights and privileges were not prejudicially affected, but we may well assume that encouragement rather than restriction would be anticipated. Certainly it was intended to be open to the Legislature to determine in its wisdom that popular ignorance is an evil, and to seek to guard against such by [299] providing for all, at the public expense, free secular education of such character as to it should seem proper. It may be that the opportunities thus offered would naturally draw to the public schools pupils who would otherwise attend denominational schools and contribute to the support of the latter and thus enable those in charge of the latter to maintain them at a higher degree of efficiency. It may be, on the other hand, that the competition would only stimulate the supporters of denominational schools to greater exertions and insure a higher standard in such schools; in either view, however, the effect would be an indirect one, and it would rather be an effect upon the schools themselves and their supporters than upon any right or privilege with respect to such schools. It does not appear to me that in the non-existence before the union of competition of that character there can be recognised a right or privilege with respect to denominational schools, existing either by law or by practice.

It was, I think, beyond question that it was intended that the Legislature should be able to make laws for providing against popular ignorance as being an evil, and to authorize the incurring of expense for the purpose, and the levying of taxes to meet such expense as upon any other subject within its powers. I am unable, therefore, to regard the circumstance that in some cases the expense thus occasioned to individuals may render them less able or less willing to contribute to the support of denominational schools,

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as shewing that the legislation prejudicially affects a right or privilege in respect of such schools. The effect is so indirect and remote that I cannot take it to be within the Act, and it is precisely the same effect that would be produced by taxation for other purposes within the powers of the Legislature.

It is, however, urged that even though the natural meaning of the language of the statutes would lead to such conclusions as these, the history of the controversy respecting separate or denominational schools in the other Provinces and elsewhere, and the mode in which it was settled for the other Provinces by the original [300] confederation Act, and the changes made in the wording of the Manitoba Act, shew that it was intended that a more enlarged view of the protected rights and privileges should be taken.

Now, in the first place, it is not correct as claimed, that the original Act assumed to settle the question for Canada; it merely guarded rights and privileges already given in each Province. In Nova Scotia and New Brunswick, the question still remains an open one. There was, then, no intention under the original Act, that the question should be settled for Canada generally in favour of the immunity of any class from taxation for the support of non-denominational public schools, excepting so far as such immunity had previously existed by law.

Counsel for the applicant forget that the question has two sides, and that there are many who deem it more for the interest of the State to encourage only one system of schools, and that the definite settlement of such an important question ought naturally to be expressed in clear language. It was evidently considered that the rights of minorities in Lower Canada should be extended or at any rate more distinctly preserved so as to be securely placed upon the same basis in Ontario and Quebec. When, therefore, Parliament intended to settle what had not previously been settled, or which it feared had not previously been settled, it did so.

While the older Provinces had had before the union their own legislatures, representative of popular opinion to settle this question for them, none such had existed here, and it is difficult to believe, without clear evidence that Parliament had considered and settled the matter, that Parliament would have desired to preclude this portion of Canada from considering this question for itself. The language of the British North America Act was sufficiently

definite, having reference to the express legislation of the previous Provinces, but with no express law here to which reference could [301] be made, it was certainly as important as in the case of Quebec, to make the position clear if it was to be as the applicant contends.

I attach very little importance to the words "or practice" as definitely shewing any such intention. The position of affairs here before the union was anomalous. Both the extent of the territorial jurisdiction of the Hudson's Bay Company and the nature of its authority had been regarded as very doubtful. Its government was recognised, however, as being the de facto one, and the Manitoba Act shews in other parts, the intention to recognise what had been regarded as rights under the old regime, irrespective of strict law. Under such circumstances, the introduction of the words was quite natural, and I cannot take them as adding to the ordinary sense of the whole enactment. The change in the second sub-section from the language of the third sub-section of the 93rd sect. of the original Act appears to me infinitely more important. In the original Act the appeal to the Governor-General in Council was given only in Provinces in which there had existed, prior to the union, a system of separate or dissentient schools, or in which such should afterwards be established. In the case of Manitoba it was given absolutely, which may be claimed to shew that Parliament contemplated that practically such a system had existed here before the union, or was at any rate secured by the first sub-section in connection with any system of public schools which might be established by the Legislature. It would be natural, too, if this were the idea existing, that an appeal should have been given from an act of the Legislature as well as from an act or decision of a provincial authority.

Now I must confess that I have not accounted satisfactorily to my own mind for this change of language. Little attention was paid to this sub-section upon the argument, and no suggestion was distinctly made upon it. Probably before the main question can be considered finally settled, or upon some appeal under the sub-section, a view may be suggested which will at once appear to be the true one. At present I can only suggest the alternative one, [302] that it came about for much the same considerations as the introduction of the words "or practice." It may well have been

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felt that in view of the undetermined position of affairs, and of the absence of clear and express legislation to which reference could be made, it was advisable that the right of appeal should be more extended than in the case of the other Provinces, and this appears to me to be the more reasonable and probable explanation. Now, before the union, several classes of persons exercised the privilege of maintaining denominational schools in the territory now forming this Province, of having their children educated in them, and of having inculcated therein the peculiar doctrines of their respective denominations. History teaches us that bigotry has frequently denied to minorities the exercise of some or all of these privileges. The right to continue their exercise is no unimportant one. Nay, if these privileges were attacked, they would soon appear of infinitely greater importance than the liability to pay taxes for the support of free non-sectarian public schools for the benefit of those choosing to take advantage of them. Taking, then, the language of the Union Acts in its natural sense, important rights and privileges are guarded. It is not necessary to go beyond their natural meaning in order to give effect to any of the language used. I take the question here raised to be merely that of the liability of all property holders to be subjected to equal taxation for the support of free non-sectarian public schools which may be used by such as choose. The right to immunity from such taxation was not, under the original confederation Act, generally established throughout Canada in favour of any class or classes ; and if intended to be established here, one would have expected this to be indicated by more distinct language than is found in the Manitoba Act. Such immunity was general here before the union and not in any way existing in respect of denominational schools, or in favour of any class or classes ; the denominational schools did not, by law or practice, enjoy any recognised right or privilege to be kept free from any kind of competition.

[303] The burden is naturally upon those who seek to limit the power of the Legislature to choose from time to time, as circumstances change, between a sectarian and a non-sectarian system of public school education, or its exercise of the sovereign power of taxation in order to afford education free, if it thinks it necessary or advisable in the interests of the Province, to any greater extent than is naturally involved in the language of the constitution. I

am unable, therefore, to hold that the Public Schools Act, if enacted at the outset of the union, would have been ultra vires in establishing this new system of schools and in authorizing the taxation complained of, without establishing or providing for the support of separate schools for any class. I think that it was quite competent for the Legislature to abolish the system of separate schools, which it had established, and leave parties to recur to their voluntary denominational schools if they saw fit. That they will do so, his Grace the Archbishop states. In so doing, he practically admits that they are at liberty to revert to the system existing before the union, though he claims that they will do so under certain disadvantages, the indirect causing of which, by the adoption of the new system, I cannot consider to be within the saving clauses of the constitution.

Whether this be done, or whether Roman Catholics submit wholly or partially, with heart burnings and dissatisfaction, to the new system of public schools, it is for the Legislature and not for the courts to determine whether there can be such grave reasons of State as to warrant a disregard of the complaints of the minority. On the one hand it has the example of other legislatures to shew that it is not alone in deeming the reasons sufficient. On the other, many will doubt whether human wisdom is so far infallible as to warrant absolute reliance upon the sufficiency of these reasons.

I can merely repeat the language of the learned Chief Justice of New Brunswick, now the Chief Justice of Canada: "It may be [304] a very great hardship, that a large class of persons should be forced to contribute to the support of schools to which they are conscientiously opposed, or be shut out from what they have hitherto, under certain circumstances, enjoyed and be without remedy; but, by any such considerations, courts of justice ought not be influenced; hard cases, it has been repeatedly said, make bad law, and it has also been justly remarked that if there is a general hardship affecting a general class of cases or persons, it is a consideration for the Legislature, not for a court of justice."

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## PRIVY COUNCIL.

BROPHY AND OTHERS ..... *Appellants* ;

AND

THE ATTORNEY-GENERAL OF MANITOBA.... *Respondent*.*On Appeal from the Supreme Court of Canada.*[*Reported [1895] A.C. 202.*]

*Law of Canada—Province of Manitoba—Dominion Statute, 33 Vict.  
c. 3, s. 22, sub-ss. 2, 3—Manitoba Public Schools Act, 1890—  
Appeal to the Governor-General in Council—Remedies against Pro-  
vincial legislation.*

Where the Roman Catholic minority of Manitoba appealed to the Governor-General in Council against the Manitoba Education Acts of 1890, on the ground that their rights and privileges in relation to education had been affected thereby :—

*Held*, reversing the judgment of the Supreme Court on a case submitted to it :

(a) That such appeal lay under sect. 22, sub-sect. 2, of the Manitoba Act, 1870, which applies to rights and privileges acquired by legislation in the Province after the date thereof.

(b) That the Roman Catholics having acquired by such legislation the right to control and manage their denominational schools, to have them maintained out of the general taxation of the Province, to select books for their use, and to determine the character of the religious teaching therein, were affected as regards that right by the Acts of 1890, under which State aid was withdrawn from

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\**Present* :—THE LORD CHANCELLOR, LORD WATSON, LORD MACNAGHTEN,  
AND LORD SHAND.



schools which any class of persons have by law or practice, in the Province at the Union.

“(2) An appeal shall lie to the Governor-General in Council from any Act or decision of the Legislature of the Province, or of any provincial authority, affecting any right or privilege of the Protestant or Roman Catholic minority of the Queen’s subjects in relation to education.

“(3) In case any such provincial law as from time to time seems to the Governor-General in Council requisite for the due execution of the provisions of this section is not made, or in case any decision of the Governor-General in Council on any appeal under this section is not duly executed by the proper provincial authority in that behalf, then, and in every such case and as far only as the circumstances of each case require, the Parliament of Canada may make remedial laws for the due execution of the provisions of this section, and of any decision of the Governor-General in Council under this section.”

Sect. 93 of the British North America Act, 1867, is—

“In and for each Province the Legislature may exclusively make laws in relation to education, subject and according to the following provisions:—

“(1) Nothing in any such law shall prejudicially affect any right or privilege with respect to denominational schools, which any class of persons have by law in the Province at the Union. . . .

“(3) Where in any Province a system of separate or dissentient schools exists by law at the Union, or is [205] thereafter established by the Legislature of the Province, an appeal shall lie to the Governor-General in Council from any act or decision of any provincial authority affecting any right or privilege of the Protestant or Roman Catholic minority of the Queen’s subjects in relation to education.”

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In submitting the case referred to the Supreme Court the Governor-General in Council set forth the evidence in two cases called *Barrett's Case* and *Logan's Case* (1), the effect of which is stated in the judgment of their Lordships therein. The following is a short summary thereof:—

At the time when Manitoba was admitted to the Union there was no law or regulation or ordinance with respect to education in force. There were no public schools in the sense of State schools, but there existed throughout the Province a number of denominational schools maintained by school fees or voluntary contributions, and conducted according to the tenets of the religious body to which they might belong. These schools were neither supported by grants from the public funds, nor were any of them in any way regulated or controlled by any public officials. In 1871 however, the year after the admission of Manitoba to the Union, a law was passed which established throughout the Province a system of denominational education in the common schools, as they were then called. A Board of Education was formed, which was to be divided into two sections, Protestant and Roman Catholic. Each section was to have under its control and management the discipline of the schools of the section. Each of the twenty-four electoral divisions into which the Province had by the Manitoba Act been divided was constituted a school district in the first instance, and there was to be a school in each district. Twelve electoral divisions "comprising mainly a Protestant population" were to be considered Protestant school districts; twelve "comprising mainly a Roman Catholic population" were to be considered Roman Catholic school districts. These schools were to

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(1) [1892] A.C. 445; *ante*, p. 32.

be maintained by grants from the public funds, to be divided equally between the Protestant and Roman Catholic schools, and contributions from the people of [206] each school district. Such contributions might be raised by an assessment on the property of the school district.

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The laws relating to education were modified from time to time. From the year 1876 to 1890 enactments were in force declaring that in no case should a Protestant ratepayer be obliged to pay for a Roman Catholic school, or a Roman Catholic ratepayer for a Protestant school, and by an Act passed in 1881 it was provided that the legislative grant should no longer be divided equally between Protestant and Roman Catholic schools, but should be divided between the Protestant and Roman Catholic section of the Board in proportion to the number of children between the ages of five and fifteen residing in the various Protestant and Roman Catholic school districts.

The system of denominational education was maintained in full vigour until 1890, when the statutes complained of by the appellants were passed. One of them established in the place of the Board of Education a Department of Education, and a board consisting of seven members, known as the "Advisory Board."

The Public Schools Act, 1890, repealed all previous legislation relating to public education, and enacted that all Protestant and Roman Catholic school districts should be subject to the provisions of the Act, and that all public schools should be free schools. At the option of the school trustees for each district, religious exercises conducted according to the regulations of the Advisory Board and at the times prescribed by the Act were to be



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held in the public schools. The religious services were to be entirely non-sectarian, and any pupil whose parent or guardian should so wish was to be dismissed from school before the religious exercises should take place.

The Act then provided for the formation, alteration and union of school districts, for the election of school trustees, and for levying a rate on the taxable property in each school district for school purposes. A portion of the legislative grant for educational purposes was allotted to public schools, but no school was to participate in the grant unless it were conducted according to all the provisions of the Act and the regulations of the Department of Education and of the Advisory Board.

[207] *E. Blake*, Q. C. and *J. S. Ewart*, Q. C., of the Canadian Bar, for the appellants, who represented the Roman Catholic minority of the Queen's subjects in the Province of Manitoba, contended (1.) that the appeal was admissible; (2.) that the Governor-General in Council could and ought to have given appropriate relief. In *Barrett's* and *Logan's Cases* (1) the validity of the Public Schools Act, 1890, was assailed as ultra vires, having regard to sect. 22, sub-sect. 1 of the Manitoba Act, 1870. Here its validity is assumed, but it is contended that an appeal lies to the Governor-General in Council to rectify its provisions as transgressing the restrictions contained in sub-sect. 2, which sub-sect. is in harmony with sub-sect. 3 of sect. 93 of the Imperial Act of 1867. There are several marked distinctions of the same character between sub-sects. 1 and 2 of the Manitoba Act and also between sub-sects. 1 and 3 of sect. 93 of the Act of 1867. They shew that sub-sect. 1 of each section relates to a different class of cases and to a different condition of

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(1) [1892] A. C. 445; *ante*, p. 32.

things from that dealt with by the later sub-section. For example sub-sect. 1 of the Manitoba Act refers to a right or privilege with respect to denominational schools of any class of persons, whether constituting a majority of the population or not, existing by law or practice at the date of the Union, and to cases in which such right has been prejudicially affected. Sub-sect. 2 on the other hand, refers to a right or privilege in relation to education of a particular class, namely, a Protestant or Roman Catholic minority, whether existing at the date of the Union or created thereafter, and to cases in which such right has been affected in any way, including cases in which the relative status was altered, even though the actual position of the minority was not changed for the worse. The cases, therefore are broadly distinguished in which, on the one hand, legislation is void as ultra vires, and in which, on the other, legislation though intra vires yet affects the rights and privileges of a class. In the former case no appeal is required. Any one aggrieved can successfully resist its application. In the latter an appeal of the kind refused by the Supreme Court is requisite, appropriate, and useful as leading to redress by [208] supplemental corrections of the Acts impugned. In this case the Manitoba Education Acts passed prior to 1890 confirmed and continued to the minority a right or privilege in relation to education within the meaning of sub-sect. 2 of the Manitoba Act. They also established a system of separate or dissentient schools within the meaning of sub-sect. 2 of the Act of 1867, sect. 93. The provisions of the Manitoba Acts of 1890 did, on the contrary, affect a right and privilege of the minority in such sort that an appeal for redress lay to the Governor-General in Council. As regards sub-sect. 3 of sect.

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93 of the Act of 1867, it applies on its true construction to Manitoba, for the general object of that Act was to put all the provinces at whatever date they entered the confederation as nearly as possible on the same footing. The Manitoba Act does not restrict the Act of 1867 while making it applicable in a general way ; it was contended that its terms are even wider than those of the earlier Act. It was not sought in this appeal for any declaration as to the extent of the relief to be granted by the Governor-General ; a ruling was desired that he had jurisdiction to hear the prayer of the petition and to grant appropriate relief.

*Cozens-Hardy*, Q. C., *Haldane*, Q. C. and *Bray*, for the respondent, contended that the Supreme Court decided rightly. Laws in relation to education are within the powers of the Provincial Legislature. As regards the Manitoba Legislature, those powers are completely defined by sect. 22 of the Manitoba Act. Those powers are not limited, extended, or in any way affected by sect. 93 of the British North America Act, 1867. As regards sub-sect. 3 of sect. 93, assuming it applies just as it stands to Manitoba, it was contended that this appeal did not lie thereunder. The appeal allowed by that sub-section was an appeal from an " Act or decision of any provincial authority." The statutes complained of, namely, the Acts of 1890, are not Acts or decisions of a provincial authority, within the meaning of that section, which points rather to executive and judicial than to legislative authority; and in the second place there is not and there never has been a system of separate or dissentient schools established by law in Manitoba.

[209] But that sub-sect. 3 has been varied by sub-sect. 2 of sect. 22 of the Manitoba Act. It therefore does not



apply, by virtue of sect. 2 of that Act. The position is this : sub-sect. 1 exhaustively defines the limits set to provincial legislative authority. Sub-sect. 2 contains more general provisions, which should be read as consistent with and not as cutting down the language of sub-sect. 1. There is no inconsistency between those sub-sections, and the latter should be so construed as to leave the former as fully operative as if it had stood alone. Accordingly, under sect. 22, an appeal to the Governor-General only lies when rights or privileges existing by law or practice at the Union have been affected. The decisions in *Barrett's* and *Logan's Cases* (1) are conclusive that such privileges have not been infringed. On the contrary view contended for by the appellants, assuming that rights and privileges created since the Union are within the meaning of sect. 22, still the Acts of 1890 have not affected any right or privilege of the Roman Catholic minority in relation to education established by law or practice since that time. The main effect of that legislation was that all public schools should be free schools ; that all districts, whether Roman Catholic or Protestant, should be subject to its provisions. Certain non-sectarian religious exercises were to be held in the public schools at the option of the school trustees. Pupils might withdraw before this took place. No school which infringed those regulations would participate in the grant. All denominations were therefore placed on an equal footing ; their special teaching was impartially excluded from within the schools, and impartially permitted without the schools. The Acts between 1871 and 1890 did not give any vested right or privilege at all to the minority in relation to education ; only contingent and conditional

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rights and privileges of exemption from the system thereby established. No doubt the Acts of 1890 repealed all previous legislation with regard to education. If any appeal lay on that ground, it would be tantamount to denying the right inherent in all legislatures of repealing or altering its own legislation. It would reduce the provincial power of legislation to a nullity if the Governor-General in Council should be held to possess [210] an arbitrary jurisdiction to review and rescind at his discretion, and without any reference to the constitutional right of the Province of Manitoba, any Acts of its legislature, notwithstanding that they are *intra vires* and constitutional.

*Blake, Q. C.*, replied.

The judgment of their Lordships was delivered by

THE LORD CHANCELLOR:—

In the year 1890, two Acts were passed by the Legislature of Manitoba relating to education. One of these created a Department of Education and an "Advisory Board." The Board was to consist of seven members, four of whom were to be appointed by the Department of Education, two to be elected by the Public and High School teachers of the Province, and one to be appointed by the University Council. The Advisory Board were empowered (amongst other things) to authorize text books for the use of pupils and to prescribe the form of religious exercises to be used in schools.

The other Act which was termed "The Public Schools Act" established a system of public education "entirely non-sectarian" no religious exercises being allowed except those conducted according to the regulations of the Advisory Board. It will be necessary hereafter to

refer somewhat more in detail to the provisions of this Act.

The Act came into force on the first of May, 1890. By virtue of its provisions, by-laws were made by the municipal corporation of Winnipeg, under which a rate was to be levied upon Protestant and Roman Catholic rate-payers alike for school purposes. An application was thereupon made to the Court of Queen's Bench of Manitoba, to quash these by-laws on the ground that the Public Schools Act, 1890, was ultra vires of the Provincial Legislature, inasmuch as it prejudicially affected a right or privilege with respect to denominational schools which the Roman Catholics had by law or practice in the Province at the Union. The Court of Queen's Bench refused [211] the application, being of opinion that the Act was intra vires. The Supreme Court of Canada took a different view; but upon appeal this Board reversed their decision and restored the judgment of the Court of Queen's Bench.

Memorials and petitions were afterwards presented to the Governor-General in Council on behalf of the Roman Catholic minority of Manitoba by way of appeal against the Education Acts of 1890. These memorials and petitions having been taken into consideration, a case in relation thereto was in pursuance of the provisions of the Supreme and Exchequer Courts Act referred by the Governor-General in Council to the Supreme Court of Canada. The questions referred for hearing and consideration were the following:—

“(1) Is the appeal referred to in the said memorials and petitions, and asserted thereby, such an appeal as is admissible by sub-sect. 3 of sect. 93 of the British North America Act, 1867, or by sub-sect. 2 of sect. 22 of the Manitoba Act, 33 Vict. c. 3, Canada?

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“(2) Are the grounds set forth in the petitions and memorials such as may be the subject of appeal under the authority of the sub-sections above referred to, or either of them ?

“(3) Does the decision of the Judicial Committee of the Privy Council in the cases of *Barrett v. The City of Winnipeg* (1) and *Logan v. The City of Winnipeg* (1) dispose of or conclude the application for redress based on the contention that the rights of the Roman Catholic minority which accrued to them after the Union under the statutes of the Province have been interfered with by the two statutes of 1890 complained of in the said petitions and memorials ?

“(4) Does sub-sect. 3 of sect. 93 of the British North America Act, 1867, apply to Manitoba ?

“(5) Has His Excellency the Governor-General in Council power to make the declarations or remedial orders which are asked for in the said memorials and petitions, assuming the material facts to be as stated therein, or has His Excellency the Governor-General in Council any other jurisdiction in the premises ?

[212] “(6) Did the Acts of Manitoba relating to education, passed prior to the session of 1890, confer on or continue to the minority ‘ a right or privilege in relation to education ’ within the meaning of sub-sect. 2 of sect. 22 of the Manitoba Act, or establish a system of ‘ separate or dissentient schools ’ within the meaning of sub-sect. 3 of sect. 93 of the British North America Act, 1867, if said sect. 93 be found applicable to Manitoba ; and if so, did the two Acts of 1890 complained of, or either of them, affect any right or privilege of the minority in such a manner that an appeal will lie thereunder to the Governor-General in Council ? ”

The learned judges of the Supreme Court were divided in opinion upon each of the questions submitted. They were all, however, by a majority of three judges out of five, answered in the negative.

The appeal to the Governor-General in Council was founded upon the 22nd section of the Manitoba Act, 1870, and the 93rd section of the British North America Act, 1867. By the former of these statutes (which was confirmed and declared to be valid and effectual by an Imperial statute) Manitoba was created a province of the Dominion.

The 2nd section of the Manitoba Act enacts that, after the prescribed day the British North America Act shall, "except those parts thereof which are in terms made or by reasonable intendment may be held to be specially applicable to or only to affect one or more but not the whole of the provinces now composing the Dominion, and except so far as the same may be varied by this Act, be applicable to the Province of Manitoba in the same way and to the like extent as they apply to the several provinces of Canada, and as if the Province of Manitoba had been one of the provinces originally united by the said Act." It cannot be questioned therefore that sect. 93 of the British North America Act (save such parts of it as are specially applicable to some only of the provinces of which the Dominion was in 1870 composed) is made applicable to the Province of Manitoba except in so far as it is varied by the Manitoba Act. The 22nd section of that statute deals with the same subject-matter as sect. 93 of the British North America Act. The 2nd sub-section of this latter section may be discarded from consideration, as it is manifestly applicable only to the Provinces of Ontario and Quebec. The remaining provisions closely correspond with those of sect. 22 of the Manitoba Act. The only difference between the introductory part and the 1st sub-section of the two sections, is

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that in the Manitoba Act the words "or practice" are added after the word "law" in the 1st sub-section. The 3rd sub-section of sect. 22 of the Manitoba Act is identical with the 4th sub-section of sect. 93 of the British North America Act. The 2nd and 3rd sub-sections respectively are the same, except that in the 2nd sub-section of the Manitoba Act the words "of the Legislature of the province or" are inserted before the words "any provincial authority," and that the 3rd sub-section of the British North America Act commences with the words: "Where in any province a system of separate or dissentient schools exists by law at the union or is thereafter established by the Legislature of the province." In view of this comparison, it appears to their Lordships impossible to come to any other conclusion than that the 22nd section of the Manitoba Act was intended to be a substitute for the 93rd section of the British North America Act. Obviously all that was intended to be identical had been repeated, and in so far as the provisions of the Manitoba Act differ from those of the earlier statute, they must be regarded as indicating the variations from those provisions intended to be introduced in the Province of Manitoba.

In their Lordships' opinion, therefore, it is the 22nd section of the Manitoba Act which has to be construed in the present case, though it is of course legitimate to consider the terms of the earlier Act, and to take advantage of any assistance they may afford in the construction of enactments with which they so closely correspond and which have been substituted for them.

Before entering upon a critical examination of the important section of the Manitoba Act, it will be convenient to state the circumstances under which that Act was passed, and also the exact scope of the decision of this Board in the case of *Barrett v. The City of Winnipeg*, (1) which seems to have given rise to some misapprehension.

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(1) [1892] A. C. 445; *ante*, p. 32.



In 1867 the union of the Provinces of Canada, Nova [214] Scotia, and New Brunswick took place. Among the obstacles which had to be overcome in order to bring about that union none perhaps presented greater difficulty than the differences of opinion which existed with regard to the question of education. It had been the subject of much controversy in Upper and Lower Canada. In Upper Canada a general system of undenominational education had been established, but with provision for separate schools to supply the wants of the Catholic inhabitants of that province. The 2nd sub-section of sect. 93 of the British North America Act extended all the powers, privileges and duties which were then by law conferred and imposed in Upper Canada on the separate schools and school trustees of the Roman Catholic inhabitants of that province to the dissentient schools of the Protestant and Roman Catholic inhabitants of Quebec. There can be no doubt that the views of the Roman Catholic inhabitants of Quebec and Ontario with regard to education were shared by the members of the same communion in the territory which afterwards became the Province of Manitoba. They regarded it as essential that the education of their children should be in accordance with the teaching of their Church, and considered that such an education could not be obtained in public schools designed for all the members of the community alike, whatever their creed, but could only be secured in schools conducted under the influence and guidance of the authorities of their Church. At the time when the Province of Manitoba became part of the Dominion of Canada, the Roman Catholic and Protestant populations in the province were about equal in number. Prior to that time there did not exist in the territory then incorporated any public system of education. The several religious denominations had established such schools as they thought fit, and maintained them by means of funds voluntarily con-

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tributed by the members of their own communion. None of them received any State aid.

The terms upon which Manitoba was to become a province of the Dominion were matter of negotiation between representatives of the inhabitants of Manitoba and of the Dominion Government. The terms agreed upon, so far as education was concerned, must be taken to be embodied in the 22nd section of the Act of 1870. Their Lordships [215] do not think that anything is to be gained by the inquiry how far the provisions of this section place the Province of Manitoba in a different position from the other provinces, or whether it was one more or less advantageous. There can be no presumption as to the extent to which a variation was intended. This can only be determined by construing the words of the section according to their natural signification.

Among the very first measures passed by the Legislature of Manitoba was an Act to establish a system of education in the province. The provisions of that Act will require examination. It is sufficient for the present to say that the system established was distinctly denominational. This system, with some modifications of the original scheme, the fruit of later legislation, remained in force until it was put an end to by the Acts which have given rise to the present controversy.

In *Barrett's Case* (1) the sole question raised was whether the Public Schools Act of 1890 prejudicially affected any right or privilege which the Roman Catholics by law or practice had in the province *at the Union*. Their Lordships arrived at the conclusion that this question must be answered in the negative. The only right or privilege which the Roman Catholics then possessed, either by law or in practice, was the right or privilege of establishing and maintaining for the use of members of their own Church such schools as they pleased. It appeared

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(1) [1892] A. C. 445; *ante*, p. 32.

to their Lordships that this right or privilege remained untouched, and therefore could not be said to be affected by the legislation of 1890. It was not doubted that the object of the 1st sub-section of sect. 22 was to afford protection to denominational schools, or that it was proper to have regard to the intent of the Legislature and the surrounding circumstances in interpreting the enactment. But the question which had to be determined was the true construction of the language used. The function of a tribunal is limited to construing the words employed ; it is not justified in forcing into them a meaning which they cannot reasonably bear. Its duty is to interpret, not to enact. It is true that the construction put by this Board upon the 1st sub-section reduced within very narrow limits the protection afforded by that sub-section in [216] respect of denominational schools. It may be that those who were acting on behalf of the Roman Catholic community in Manitoba, and those who either framed or assented to the wording of that enactment, were under the impression that its scope was wider, and that it afforded protection greater than their Lordships held to be the case. But such considerations cannot properly influence the judgment of those who have judicially to interpret a statute. The question is, not what may be supposed to have been intended, but what has been said. More complete effect might in some cases be given to the intentions of the Legislature, if violence were done to the language in which their legislation has taken shape, but such a course would on the whole be quite as likely to defeat as to further the object which was in view. Whilst however it is necessary to resist any temptation to deviate from sound rules of construction in the hope of more completely satisfying the intention of the Legislature, it is quite legitimate where more than one construction of a statute is possible, to select that one which will best carry out what appears from the general scope of the legislation

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and the surrounding circumstances to have been its intention.

With these preliminary observations their Lordships proceed to consider the terms of the 2nd and 3rd sub-sections of sect. 22 of the Act of 1870, upon the construction of which the questions submitted chiefly depend. For the reasons which have been given their Lordships concur with the majority of the Supreme Court in thinking that the main issues are not in any way concluded either by the decision in *Barrett's Case* (1) or by any principles involved in that decision.

At the outset this question presents itself. Are the 2nd and 3rd sub-sections, as contended by the respondent, and affirmed by some of the Judges of the Supreme Court, designed only to enforce the prohibition contained in the 1st sub-section? The arguments against this contention appear to their Lordships conclusive. In the first place that sub-section needs no further provision to enforce it. It imposes a limitation on the legislative powers conferred. Any enactment contravening its provisions is beyond the competency of the Provincial Legislature, [217] and therefore null and void. It was so decided by this Board in *Barrett's Case* (1). A doubt was there suggested whether that appeal was competent, in consequence of the provisions of the 2nd sub-section, but their Lordships were satisfied that the provisions of sub-sects. 2 and 3 did not "operate to withdraw such a question as that involved in the case from the jurisdiction of the ordinary tribunals of the country." It is hardly necessary to point out how improbable it is that it should have been intended to give a concurrent remedy by appeal to the Governor-General in Council. The inconveniences and difficulties likely to arise, if this double remedy were open, are obvious. If, for example, the Supreme Court of Canada, and this Committee on appeal, declared an enact-

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(1) [1892] A. C. 445; *ante*, p. 32.

ment of the Legislature of Manitoba relating to education to be *intra vires*, and the Governor-General in Council on an appeal to him considered it *ultra vires*, what would happen? If the Provincial Legislature declined to yield to his view, as would almost certainly and most naturally be the case, recourse could only be had to the Parliament of the Dominion. But the Parliament of Canada is only empowered to legislate as far as the circumstances of the case require "for the due execution of the provisions" of the 22nd section. If it were to legislate in such a case as has been supposed, its legislation would necessarily be declared *ultra vires* by the Courts which had decided that the provisions of the section had not been violated by the Legislature of the province. If on the other hand the Governor-General declared a provincial law to be *intra vires*, it would be an ineffectual declaration. It could only be made effectual by the action of the Courts, which would have for themselves to determine the question which he decided, and if they arrived at a different conclusion and pronounced the enactment *ultra vires* it would be none the less null and void because the Governor-General in Council had declared it *intra vires*. These considerations are of themselves most cogent to shew that the 2nd sub-section ought not to be construed as giving to parties aggrieved an appeal to the Governor-General in Council concurrently with the right to resort to the Courts in case the provisions of the 1st sub-section are contravened, unless no other construction of the sub-sections be reasonably possible. The nature of the remedy, too, which the 3rd sub-section provides, for enforcing the decision of the Governor-General, strongly confirms this view. That remedy is either a provincial law or a law passed by the Parliament of Canada. What would be the utility of passing a law for the purpose merely of annulling an enactment which the ordinary tribunals would without leg-

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islation declare to be null, and to which they would refuse to give effect? Such legislation would indeed be futile.

So far the matter has been dealt with apart from an examination of the terms of the 2nd sub-section itself. The considerations adverted to would seem to justify any possible construction of that sub-section which would avoid the consequences pointed out. But when its language is examined, so far from presenting any difficulties, it greatly strengthens the conclusion suggested by the other parts of the section. The first sub-section is confined to a right or privilege of a "class of persons" with respect to denominational education "at the Union," the 2nd sub-section applies to laws affecting a right or privilege "of the Protestant or Roman Catholic minority" in relation to education. If the object of the 2nd sub-section had been that contended for by the respondent, the natural and obvious mode of expressing such intention would have been to authorize an appeal from any Act of the Provincial Legislature affecting "any such right or privilege as aforesaid." The limiting words "at the Union" are however omitted, for the expression "any class of persons," there is substituted "the Protestant or Roman Catholic minority of the Queen's subjects," and instead of the words "with respect to denominational schools," the wider term "in relation to education" is used.

The 1st sub-section invalidates a law affecting prejudicially the right or privilege of "any class" of persons; the 2nd sub-section gives an appeal only where the right or privilege affected is that of the Protestant or Roman Catholic minority." Any class of the majority is clearly within the purview of the 1st sub-section, but it seems equally clear that no class of the Protestant or Catholic majority would have a locus standi to appeal under the 2nd sub-section because its rights or privileges had been [219] affected. Moreover to bring a case within that sub-section it would be essential to shew that a right or privi-



lege had been "affected." Could this be said to be the case because a void law had been passed which purported to do something but was wholly ineffectual? To prohibit a particular enactment and render it ultra vires surely prevents its affecting any rights.

It would do violence to sound canons of construction if the same meaning were to be attributed to the very different language employed in the two sub-sections.

In their Lordships' opinion the 2nd sub-section is a substantive enactment, and is not designed merely as a means of enforcing the provision which precedes it. The question then arises, does the sub-section extend to rights and privileges acquired by legislation subsequent to the Union? It extends in terms to "any" right or privilege of the minority affected by an Act passed by the Legislature, and would therefore seem to embrace all rights and privileges existing at the time when such Act was passed. Their Lordships see no justification for putting a limitation on language thus unlimited. There is nothing in the surrounding circumstances, or in the apparent intention of the Legislature, to warrant any such limitation. Quite the contrary. It was urged that it would be strange if an appeal lay to the Governor-General in Council against an Act passed by the Provincial Legislature because it abrogated rights conferred by previous legislation, whilst if there had been no previous legislation, the Acts complained of would not only have been intra vires but could not have afforded ground for any appeal. There is no doubt force in this argument, but it admits, their Lordships think, of an answer.

Those who were stipulating for the provisions of sect. 22 as a condition of the Union, and those who gave their legislative assent to the Act by which it was brought about, had in view the perils then apprehended. The immediate adoption by the Legislature of an educational system obnoxious either to Catholics or Protestants

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would not be contemplated as possible. As has been already stated, the Roman Catholics and Protestants in the province were about equal in number. It was impossible at that time for either party to obtain legislative sanction to a scheme of education obnoxious to the other. The establishment of a system of public education in which both parties would concur was probably then in immediate prospect. The Legislature of Manitoba first met on the 15th of March, 1871. On the 3rd of May following the Education Act of 1871 received the Royal Assent. But the future was uncertain. Either Roman Catholics or Protestants might become the preponderating power in the Legislature, and it might under such conditions be impossible for the minority to prevent the creation at the public cost of schools which, though acceptable to the majority, could only be taken advantage of by the minority on the terms of sacrificing their cherished convictions. The change to a Roman Catholic system of public schools would have been regarded with as much distaste by the Protestants of the province as the change to an unsectarian system was by the Catholics.

Whether this explanation be the correct one or not, their Lordships do not think that the difficulty suggested is a sufficient warrant for departing from the plain meaning of the words of the enactment, or for refusing to adopt the construction which apart from this objection would seem to be the right one.

Their Lordships being of opinion that the enactment which governs the present case is the 22nd section of the Manitoba Act, it is unnecessary to refer at any length to the arguments derived from the provisions of sect. 93 of the British North America Act. But in so far as they throw light on the matter they do not in their Lordships' opinion weaken, but rather strengthen the views derived from a study of the later enactment. It is admitted that



the 3rd and 4th sub-sections of sect. 93 (the latter of which is, as has been observed, identical with sub-sect. 3 of sect. 22 of the Manitoba Act) were not intended to have effect merely when a provincial Legislature had exceeded the limit imposed on its powers by sub-sect. 1, for sub-sect. 3 gives an appeal to the Governor-General not only where a system of separate or dissentient schools existed in a province at the time of the Union, but also where in any province such a system was "thereafter established by the Legislature of the province." It is manifest that this relates to a state of things created by post-Union legislation. It was said it refers only to acts [221] or decisions of a "provincial authority," and not to acts of a provincial Legislature. It is unnecessary to determine this point, but their Lordships must express their dissent from the argument that the insertion of the words "of the Legislature of the province" in the Manitoba Act shews that in the British North America Act it could not have been intended to comprehend the Legislatures under the words "any provincial authority." Whether they be so comprehended or not has no bearing on the point immediately under discussion.

It was argued that the omission from the 2nd sub-section of sect. 22 of the Manitoba Act of any reference to a system of separate or dissentient schools "thereafter established by the Legislature of the province" was unfavourable to the contention of the appellants. This argument met with some favour in the Court below. If the words with which the 3rd sub-section of sect. 93 commences had been found in sub-sect. 2 of sect. 22 of the Manitoba Act, the omission of the following words would no doubt have been important. But the reason for the difference between the sub-sections is manifest. At the time the Dominion Act was passed a system of denominational schools adapted to the demands of the minority existed in some provinces, in others it might thereafter

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be established by legislation, whilst in Manitoba in 1870 no such system was in operation, and it could only come into existence by being "thereafter established." The words which preface the right of appeal in the Act creating the Dominion would therefore have been quite inappropriate in the Act by which Manitoba became a province of the Dominion. But the terms of the critical sub-section of that Act are, as has been shewn, quite general, and not made subject to any condition or limitation.

Before leaving this part of the case, it may be well to notice the argument urged by the respondent that the construction which their Lordships have put upon the 2nd and 3rd sub-sections of sect. 22 of the Manitoba Act is inconsistent with the power conferred upon the Legislature of the province to "exclusively make laws in relation to education." The argument is fallacious. The power conferred is not absolute, but limited. It is exerciseable only "subject and according to the following provisions." The sub-sections which follow, therefore, whatever be their true construction, define the conditions under which alone the Provincial Legislature may legislate in relation to education, and indicate the limitations imposed on, and the exceptions from, their power of exclusive legislation. Their right to legislate is not indeed, properly speaking, exclusive, for in the case specified in sub-section 3 the Parliament of Canada is authorised to legislate on the same subject. There is, therefore, no such inconsistency as was suggested.

The learned Chief Justice of the Supreme Court was much pressed by the consideration that there is an inherent right in a Legislature to repeal its own legislative acts and that "every presumption must be made in favour of the constitutional right of a legislative body to repeal the laws which it has itself enacted." He returns to this point more than once in the course of his judg-

ment, and lays down as a maxim of constitutional construction that an inherent right to do so cannot be deemed to be withheld from a legislative body having its origin in a written constitution, unless the constitution in express words takes away the right, and he states it as his opinion that in construing the Manitoba Act the Court ought to proceed on this principle, and to hold the Legislature of that province to have absolute powers over its own legislation, untrammelled by any appeal to federal authority, unless it could find some restriction of its rights in that respect in express terms in the Constitutional Act.

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Their Lordships are unable to concur in the view that there is any presumption which ought to influence the mind one way or the other. It must be remembered that the Provincial Legislature is not in all respects supreme within the province. Its legislative power is strictly limited. It can deal only with matters declared to be within its cognizance by the British North America Act as varied by the Manitoba Act. In all other cases legislative authority rests with the Dominion Parliament. In relation to the subjects specified in sect. 92 of the British North America Act, and not falling within those set forth in sect. 91, the exclusive power of the Provincial Legislature may be said to be absolute. But this is not [223] so as regards education, which is separately dealt with and has its own code both in the British North America Act and in the Manitoba Act. It may be said to be anomalous that such a restriction as that in question should be imposed on the free action of a Legislature, but is it more anomalous than to grant to a minority who are aggrieved by legislation an appeal from the Legislature to the executive authority? And yet this right is expressly and beyond all controversy conferred. If, upon the natural construction of the language used, it should appear that an appeal was permitted under

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circumstances involving a fetter upon the power of a Provincial Legislature to repeal its own enactments, their Lordships see no justification for a leaning against that construction, nor do they think it makes any difference whether the fetter is imposed by express words or by necessary implication.

In truth, however, to determine that an appeal lies to the Governor-General in Council in such a case as the present does not involve the proposition that the Provincial Legislature was unable to repeal the laws which it had passed. The validity of the repealing Act is not now in question, nor that it was effectual. If the decision be favourable to the appellants the consequence, as will be pointed out presently, will by no means necessarily be the repeal of the Acts of 1890 or the re-enactment of the prior legislation.

Bearing in mind the circumstances which existed in 1870 it does not appear to their Lordships an extravagant notion that in creating a Legislature for the province with limited powers it should have been thought expedient, in case either Catholics or Protestants became preponderant, and rights which had come into existence under different circumstances were interfered with, to give the Dominion Parliament power to legislate upon matters of education so far as was necessary to protect the Protestant or Catholic minority as the case might be.

Taking it then to be established that the 2nd subsection of sect. 22 of the Manitoba Act extends to rights and privileges of the Roman Catholic minority acquired by legislation in the province after the Union, the next question is whether any such right or privilege has been affected by the Acts of 1890? In order to answer this [224] question it will be necessary to examine somewhat more closely than has hitherto been done the system established by the earlier legislation as well as the change effected by those Acts.



The Manitoba School Act of 1871 provided for a Board of Education of not less than ten nor more than fourteen members, of whom one half were to be Protestants and the other half Catholics. The two sections of the board might meet at any time separately. Each section was to choose a chairman, and to have under its control and management the discipline of the schools of the section. One of the Protestant members was to be appointed superintendent of the Protestant schools, and one of the Catholic members superintendent of the Catholic schools, and these two were to be the joint secretaries of the board, which was to select the books to be used in the schools, except those having reference to religion or morals, which were to be prescribed by the sections respectively. The legislative grant for common school education was to be appropriated, one moiety to support the Protestant, the other moiety the Catholic schools. Certain districts in which the population was mainly Catholic were to be considered Catholic school districts, and certain other districts where the population was mainly Protestant were to be considered Protestant school districts. Every year a meeting of the male inhabitants of each district, summoned by the superintendent of the section to which the district belonged, was to appoint trustees, and to decide whether their contributions to the support of the school were to be raised by subscription, by a collection of a rate per scholar, or by assessment on the property of the district. They might also decide to erect a school house, and that the cost of it should be raised by assessment. In case the father or guardian of a school child was a Protestant in a Catholic district or vice versa, he might send the child to the school of the nearest district of the other section, and in case he contributed to the school the child attended a sum equal to what he would have been bound to pay if he had belonged to that district, he was exempt from payment to the school of the district in which he lived.

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Acts amending the education law in some respects were passed in subsequent years, but it is not necessary to refer to them, as in 1881 the Act of 1871 and these amending Acts were repealed. The Manitoba School Act, 1881, followed the same general lines as that of 1871. The number of the Board of Education was fixed at not more than twenty-one, of whom twelve were to be Protestants and nine Catholics. If a less number were appointed the same relative proportion was to be observed. The board as before was to resolve itself into two sections, Protestant and Catholic, each of which was to have the control of the schools of its section, and all the books to be used in the schools under its control were now to be selected by each section. There were to be as before a Protestant and a Catholic superintendent. It was provided that the establishment of a school district of one denomination should not prevent the establishment of a school district of the other denomination in the same place, and that a Protestant and Catholic district might include the same territory in whole or in part. The sum appropriated by the legislature for common school purposes was to be divided between the Protestant and Roman Catholic sections of the board in proportion to the number of children between the ages of five and fifteen residing in the various Protestant and Roman Catholic school districts in the province where schools were in operation. With regard to local assessments for school purposes it was provided that the ratepayers of a school district should pay their respective assessments to the schools of their respective denominations, and in no case was a Protestant ratepayer to be obliged to pay for a Catholic school, or a Catholic ratepayer for a Protestant school.

The scheme embodied in this Act was modified in some of its details by later Acts of the Legislature, but they did not affect in substance the main features, to which

attention has been called. While traces of the increase of the Protestant relatively to the Catholic population may be seen in the course which legislation took, the position of the Catholic and Protestant portions of the community in relation to education was not substantially altered, though the State aid which at the outset was divided equally between them had of course to be adjusted and made proportionate to the school population which each supplied.

[226] Their Lordships pass now to the Department of Education and Public Schools Acts of 1890, which certainly wrought a great change. Under the former of these Roman Catholics were not entitled as such to any representation on the Board of Education or on the Advisory Board, which was to authorize text books for the use of pupils and to prescribe the forms of religious exercises to be used in schools. All Protestant and Catholic school districts were to be subject to the provisions of the Public Schools Act. The public schools were all to be free, and to be entirely non-sectarian. No religious exercises were to be allowed unless conducted according to the regulations of the Advisory Board, and with the authority of the school trustees for the district. It was made the duty of the trustees to take possession of all public school property which had been acquired or given for public school purposes in the district. The municipal council of every city, town, and village, was directed to levy and collect upon the taxable property within the municipality such sums as might be required by the public school trustees for school purposes. No municipal council was to have the right to exempt any property whatever from school taxation. And it was expressly enacted that any school not conducted according to all the provisions of the Act, or the regulations of the Department of Education, or the Advisory Board, should not be deemed a public school within the meaning of the law, and

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that such school should not participate in the legislative grant.

With the policy of these Acts their Lordships are not concerned, nor with the reasons which led to their enactment. It may be that as the population of the province became in proportion more largely Protestant, it was found increasingly difficult, especially in sparsely populated districts, to work the system inaugurated in 1871, even with the modifications introduced in later years. But whether this be so or not is immaterial. The sole question to be determined is whether a right or privilege which the Roman Catholic minority previously enjoyed has been affected by the legislation of 1890. Their Lordships are unable to see how this question can receive any but an affirmative answer. Contrast the position of the Roman Catholics prior and subsequent to the Acts [227] from which they appeal. Before these passed into law there existed denominational schools, of which the control and management were in the hands of Roman Catholics, who could select the books to be used and determine the character of the religious teaching. These schools received their proportionate share of the money contributed for school purposes out of the general taxation of the province, and the money raised for these purposes by local assessment was, so far as it fell upon Catholics, applied only towards the support of Catholic schools. What is the position of the Roman Catholic minority under the Acts of 1890? Schools of their own denomination, conducted according to their views, will receive no aid from the State. They must depend entirely for their support upon the contributions of the Roman Catholic community, while the taxes out of which State aid is granted to the schools provided for by the statute fall alike on Catholics and Protestants. Moreover, while the Catholic inhabitants remain liable to local assessment for school purposes, the proceeds of that assessment are

no longer destined to any extent for the support of Catholic schools, but afford the means of maintaining schools which they regard as no more suitable for the education of Catholic children than if they were distinctively Protestant in their character.

In view of this comparison it does not seem possible to say that the rights and privileges of the Roman Catholic minority in relation to education which existed prior to 1890 have not been affected.

Taschereau, J. says that the legislation of 1890, having been irrevocably held to be *intra vires*, cannot have "illegally" affected any of the rights or privileges of the Catholic minority. But the word "illegally" has no place in the sub-section in question. The appeal is given if the rights are in fact affected.

It is true that the religious exercises prescribed for public schools are not to be distinctively Protestant, for they are to be "non-sectarian," and any parent may withdraw his child from them. There may be many, too, who share the view expressed in one of the affidavits in *Barrett's Case* (1), that there should not be any conscientious objections on the part of Roman Catholics to [228] attend such schools, if adequate means be provided elsewhere of giving such moral and religious training as may be desired. But all this is not to the purpose. As a matter of fact, the objection of Roman Catholics to schools such as alone receive State aid under the Act of 1890 is conscientious and deeply rooted. If this had not been so, if there had been a system of public education acceptable to Catholics and Protestants alike, the elaborate enactments which have been the subject of so much controversy and consideration would have been unnecessary. It is notorious that there were acute differences of opinion between Catholics and Protestants on the

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education question prior to 1870. This is recognised and emphasised in almost every line of those enactments. There is no doubt either what the points of difference were, and it is in the light of these that the 22nd section of the Manitoba Act of 1870, which was in truth a Parliamentary compact, must be read.

For the reasons which have been given their Lordships are of opinion that the 2nd sub-section of sect. 22 of the Manitoba Act is the governing enactment, and that the appeal to the Governor-General in Council was admissible by virtue of that enactment, on the grounds set forth in the memorials and petitions, inasmuch as the Acts of 1890 affected rights or privileges of the Roman Catholic minority in relation to education within the meaning of that sub-section. The further question is submitted whether the Governor-General in Council has power to make the declarations or remedial orders asked for in the memorials or petitions, or has any other jurisdiction in the premises. Their Lordships have decided that the Governor-General in Council has jurisdiction, and that the appeal is well founded, but the particular course to be pursued must be determined by the authorities to whom it has been committed by the statute. It is not for this tribunal to intimate the precise steps to be taken. Their general character is sufficiently defined by the 3rd sub-section of sect. 22 of the Manitoba Act. It is certainly not essential that the statutes repealed by the Act of 1890 should be re-enacted, or that the precise provisions of these statutes should again be made law. The system of education embodied in the Acts of 1890 no doubt commends itself to, and adequately supplies the wants [229] of, the great majority of the inhabitants of the province. All legitimate ground of complaint would be removed if that system were supplemented by provisions which would remove the grievance upon which the appeal



is founded, and were modified so far as might be necessary to give effect to these provisions.

Their Lordships will humbly advise Her Majesty that the questions submitted should be answered in the manner indicated by the views which they have expressed.

There will be no costs of this appeal.

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#### JUDGMENTS IN SUPREME COURT OF CANADA.

[Reported 22 Can. S. C. R. 577.]

STRONG, C. J. :—

This case has been referred to the court for its opinion by [651] His Excellency the Governor-General in Council, pursuant to the provisions of "An Act respecting the Supreme and Exchequer Courts," Revised Statutes of Canada, chapter 135 as amended by 54 & 55 Vict. c. 25, sect. 4.

Six questions are propounded which are as follows :

"(1) Is the appeal referred to in the said memorials and petitions (referring to certain petitions and memorials presented to the Governor-General in Council) and asserted thereby, such an appeal as is admissible by sub-sect. 3 of sect. 93 of the British North America Act, 1867, or by sub-sect. 2 of sect. 22 of the Manitoba Act, 33 Vict. (1870) c. 3, Canada ?

"(2) Are the grounds set forth in the petitions and memorials such as may be the subject of appeal under the authority of the sub-sections above referred to or either of them ?

"Does the decision of the Judicial Committee of the Privy Council in the cases of *Barrett v. The City of Winnipeg* (1) and *Logan v. The City of Winnipeg* (1) dispose of or conclude the application for redress based on the contention that the rights of the Roman Catholic minority which accrued to them after the union under the statutes of the province, have been interfered with by the two statutes of 1890 complained of in the said petitions and memorials ?

"(4) Does sub-sect. 3 of sect. 93 of the British North America Act, 1867, apply to Manitoba ?

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“(5) Has His Excellency the Governor-General in Council power to make the declarations or remedial orders which are asked for in the said memorials and petitions assuming the material facts to be as stated therein, or has His Excellency the Governor-General in Council any other jurisdiction in the premises ?

“(6) Did the Acts of Manitoba passed prior to the session of 1890 confer on or continue to the minority ‘a right or privilege in relation to education’ within the meaning of sub-sect. 2 of sect. 22 of the Manitoba Act or establish a system of ‘separate or dissentient schools’ within the meaning of sub-sect. 3 of sect. 93 of the British North America Act, 1867, if said sect. 93 be found to be applicable to Manitoba ; and if so, did the two Acts of 1890 complained of, or either of them, affect any right or privilege of the minority in such a manner that an appeal will lie thereunder to the Governor-General in Council ?”

To put it in a concise form, the questions which we are called [652] upon to answer are whether an appeal lies to the Governor-General in Council either under the British North America Act, 1867, or under the Dominion Act establishing the Province of Manitoba, against an Act or Acts of the Legislature of Manitoba passed in 1890, whereby certain Acts or parts of Acts of the same legislature, previously passed, which had conferred certain rights on the Roman Catholic minority in Manitoba in respect of separate or denominational schools, were repealed.

The matter was brought before the court by the Solicitor General, on behalf of the Crown, but was not argued by him. On behalf of the petitioners and memorialists who had sought the intervention of the Governor-General, Mr. Ewart, Q. C., appeared. Mr. Wade, Q. C., appeared as counsel on behalf of the Province of Manitoba when the matter first came on, but declined to argue the case, and the court then, in exercise of the powers conferred by 54 & 55 Vict., cap. 25, sect. 4, (substituted for the Revised Statutes of Canada, cap. 135, sect. 37,) requested Mr. Christopher Robinson, Q. C., the senior member of the bar practising before this court, to argue the case in the interest of the Province of Manitoba, and on a subsequent day the matter was fully and ably argued by Mr. Ewart and Mr. Robinson.

The proper answers to be given to the questions propounded depend principally on the meaning to be attached to the words “any right or privilege of the Protestant or Roman Catholic minority of the Queen’s subjects in relation to education” in sub-sect. 2 of sect. 22 of the Manitoba Act. Do these words include rights and privileges in relation to education which did not exist at the union, but (in the



words of sect. 93, sub-sect. 3, of the British North America Act) have been "thereafter established by the legislature of the [653] province," or is this right or privilege mentioned in sub-sect. 2 of sect. 22 of the Manitoba Act the same right or privilege which is previously referred to in sub-section 1 of sect. 22 of the Manitoba Act, viz.: one which any class of persons had by law or practice in the province at the union or a right or privilege other than one which the legislature of Manitoba itself created.

Sect. 93 of the British North America Act, 1867, is as follows :—

"In and for each Province the legislature may exclusively make laws in relation to education subject and according to the following provisions."

Sub-sect. 1 of the same section is as follows :—

"Nothing in any such law shall prejudicially affect any right or privilege with respect to denominational schools which any class of persons have by law in the Province at the Union."

And sub-sect. 3 is in these words :—

"Where in any province a system of separate or dissentient schools exists by law at the union or is thereafter established by the legislature of the province, an appeal shall lie to the Governor-General in Council from any Act or decision of any provincial authority affecting any right or privilege of the Protestant or Roman Catholic minority of the Queen's subjects in relation to education."

Sect. 22 of the Manitoba Act is as follows :—

"In and for the Province the said legislature may exclusively make laws in relation to education subject and according to the following provisions :—

"(1) Nothing in any such law shall prejudicially affect any right or privilege with respect to denominational schools which any class of persons have by law or practice in the Province at the Union.

"(2) An appeal shall lie to the Governor-General in Council from any Act or decision of the legislature of the Province or of any provincial authority affecting any right or privilege of the Protestant or Roman Catholic minority of the Queen's subjects in relation to education."

It is important to contrast these two clauses of the Acts in question, inasmuch as there is intrinsic evidence in the later Act [654] that it was generally modelled on the Imperial statute, the original confederation Act ; and the divergence in the language of the two statutes is therefore significant of an intention to make some change as regards Manitoba by the provisions of the later Act.

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It will be observed that the British North America Act, sect. 93, sub-sect. 3, contains the words "or is thereafter established by the legislature of the province," which words are entirely omitted in the corresponding section (sect. 22, sub-sect. 2) of the Manitoba Act. Again the same sub-section of the Manitoba Act gives a right of appeal to the Governor-General in Council from the legislature of the province, as well as from any provincial authority, whilst by the British North America Act the right of appeal to the Governor-General is only to be from the Act or decision of a provincial authority. I can refer this difference of expression in the two Acts to nothing but to a deliberate intention to make some change in the operation of the respective clauses. I do not see why there should have been any departure in the Manitoba Act from the language of the British North America Act unless it was intended that the meaning should be different. On the one hand, it may well be urged that there was no reason why the provinces admitted to confederation should have been treated differently; why a different rule should prevail as regards Manitoba from that which, by express words, applied to the other provinces. On the other hand there is, it seems to me, much force in the consideration, that whilst it was reasonable that the organic law should preserve vested rights existing at the union from spoliation or interference, yet every presumption must be made in favour of the constitutional right of a legislative body to repeal the laws which it has itself enacted. No doubt this right may be controlled by a written [655] constitution which confers legislative powers, and which may restrict those powers and make them subject to any condition which the constituent legislators may think fit to impose. A notable instance of this is, as my brother King has pointed out, afforded by the constitution of the United States, according to the construction which the Supreme Court in the well known *Dartmouth College Case* (1) put upon the provision prohibiting the state legislatures from passing laws impairing the obligation of contracts. It was there held, with a result which has been found most inconvenient, that a legislature which had created a private corporation could not repeal its own enactment granting the franchise, the reason assigned being that the grant of the franchise of the corporation was a contract. This has in practice been got over by inserting in such Acts an express reservation of the right of the legislature to repeal its own Act. But as it is a *prima facie* presumption that every legislative enactment is subject to repeal by the same body which enacts it,

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(1) 4 Wheaton, 518.

every statute may be said to contain an implied provision that it may be revoked by the authority which has passed it, unless the right of repeal is taken away by the fundamental law, the overriding constitution which has created the legislature itself. The point is a new one, but having regard to the strength and universality of the presumption that every legislative body has power to repeal its own laws, and that this power is almost indispensable to the useful exercise of legislative authority, since a great deal of legislation is of necessity tentative and experimental, would it be arbitrary or unreasonable, or altogether unsupported by analogy, to hold as a canon of constitutional construction that such an inherent right to repeal its own Acts cannot be deemed to be withheld from a legislative body having its origin in a written [656] constitution, unless the constitution itself, by express words, takes away the right? I am of opinion that in construing the Manitoba Act we ought to proceed upon this principle and hold the legislature of that province to have absolute powers over its own legislation, untrammelled by any appeal to federal authority, unless we find some restriction of its rights in this respect in express terms in the constitutional Act.

Then, keeping the rule of construction just adverted to in view, is there anything in the terms of sub-sect. 2 of sect. 22, of the Manitoba Act by which the right of appeal is enlarged and an appeal from the legislature is expressly added to that from any provincial authority, whilst in the British North America Act, sect. 93, sub-sect. 3, the appeal is confined to one from a provincial authority only, which expressly or necessarily implies that it was the intention of those who framed the constitution of Manitoba to impose upon its legislature any disability to exercise the ordinary powers of a legislature to repeal its own enactments? I cannot see that it does, and I will endeavour to demonstrate the correctness of this opinion.

It might well have been considered by the Parliament of the Dominion in passing the Manitoba Act that the words "any provincial authority" did not include the legislature. Then, assuming it to have been intended to conserve all vested rights—"rights or privileges existing by law or practice at the time of the union,"—and to exclude or subject to federal control even legislative interference with such pre-existent rights or privileges, this prohibition or control would be provided for by making any act or decision of the legislature so interfering the subject of appeal to the Governor-General in Council.

[657] If, however, the words of sect. 93, sub-sect. 3, "or is thereafter established by the legislature" had been repeated in sect. 22,

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the legislature would have been in express and unequivocal terms restrained from repealing laws of the kind in question which they had themselves enacted except upon the conditions of a right to appeal to the Governor-General. If it was intended not to do this but only to restrain the legislature of Manitoba from interfering with "rights and privileges" of the kind in question existing at the union, this end would have been attained by just omitting altogether from the clause the words "or shall have been thereafter established by the legislature of the province." This was done.

Next, it is clear that in interpreting the Manitoba Act the words "any provincial authority" do not include the legislature, for that expression is there used as an alternative to the "legislature of the province."

It is not to be presumed that Manitoba was intended to be admitted to the union upon any different terms from the other provinces or with rights of any greater or lesser degree than the other provinces. Some difference may have been inevitable owing to the difference in the pre-existing conditions of the several provinces. It would be reasonable to attribute any difference in the terms of union and in the rights of the province to this and as far as possible by interpretation to confine any variation in legislative powers and other matters to such requirements as were rendered necessary by the circumstances and condition of Manitoba at the time of the union.

Now let us see what would be the effect of the construction which I have suggested of both Acts—the British North America Act, sect. 93, and the Manitoba Act, sect. 22,—in their practical application to the different provinces as regards the right of provincial [658] legislatures to interfere with separate or denominational schools to the prejudice of a Roman Catholic or Protestant minority.

First then let us consider the cases of Ontario and Quebec, the two provinces which had by law denominational schools at the union. In these provinces any law passed by a provincial legislature impairing any right or privilege in respect of such denominational schools would, by force of the prohibition contained in sub-sect. 1 of sect. 93 of the British North America Act, be ultra vires of the legislature and of no constitutional validity.

Should the legislatures of these provinces (Ontario and Quebec) after confederation have conferred increased rights or privileges in relation to education on minorities, I see nothing to hinder them from repealing such Acts to the extent of doing away with the additional rights and privileges so conferred by their own legislation



without being subject to any condition of appeal to federal authority.

What is meant by the term "provincial authority"? The Parliament of the Dominion, as shewn by the Manitoba Act, hold that it does not include the legislature, for in sub-sect. 2 of sect. 22 they use it as an alternative expression and so expressly distinguish it from the legislature. It is true the British North America Act did not emanate from the Dominion Parliament, but nevertheless the construction which that Parliament has put on the British North America Act if not binding on judicial interpreters is at least entitled to the highest respect and consideration (1). Secondly, the words "provincial authority" are not apt words to describe the legislature, and in order that a provincial legislature should be subjected to an appeal, when it merely attempts to recall its own acts, the terms [659] used should be apt, clear and unambiguous. To return then to the cases of Ontario and Quebec, should any "provincial authority," not including in these words the legislature, but interpreting the expression as restricted to administrative authorities (without at present going so far as to say it included courts of justice), by any act or decision affect any right or privilege whether derived under a law or practice existing at the time of confederation or conferred by a provincial statute since the union, still remaining unrepealed and in force, that would be subject to an appeal to the Governor-General.

Secondly. As regards the Provinces of Nova Scotia and New Brunswick, those provinces not having had any denominational schools at the time of the union, there is nothing in their case for sub-sect. 1 of sect. 93 to operate upon. Should either of these provinces by after-confederation legislation create rights and privileges in favour of Protestant or Catholic minorities in relation to education, then so long as these statutes remained unrepealed and in force an appeal would lie to the Governor-General from any act or decision of a provincial administrative authority affecting any of such rights or privileges of a minority, but there would be nothing to prevent the legislatures of the provinces now under consideration from repealing any law which they had themselves enacted conferring such rights and privileges, nor would any Act so repealing their own enactments be subject to appeal to the Governor-General in Council.

Thirdly. We have the case of the Province of Manitoba; here applying the construction before mentioned the provincial powers

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[ (1) See *Citizens Insurance Co. v. Parsons* 7 App. Cas. p. 116; *ante*, vol. 1, p. 281.]

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in relation to education would be not further restricted but somewhat enlarged in comparison with those of the other provinces. Acting upon the presumption that in the absence of express words [660] in the Act of the Dominion Parliament, which embodies the constitution of the province, withholding from the legislature of the province the normal right of altering or repealing its own Acts, we must hold that it was not the intention of Parliament so to limit the legislature by the organic law of the province. What then, is the result of the legislation of the Dominion as regards Manitoba? What effect is to be given to sect. 22 of the Manitoba Act? By the first sub-section any law of the province prejudicing any right or privilege with respect to denominational schools in the province existing at the union is ultra vires and void. This clause was the subject and the only subject, of interpretation in *The City of Winnipeg v. Barrett* (1) and the point there decided was that there was no such right or privilege as was claimed in that case existing at the time of the admission of the province into the union. Had any such right or privilege been found to exist there is nothing in the judgment of the Privy Council against the inference that legislation impairing it would have been unconstitutional and void. That decision has, in my opinion, but a very remote application to the present case. The second sub-section of sect. 22 of the Manitoba Act is as follows:—

“An appeal shall lie to the Governor-General in Council from any act or decision of the Legislature of the Province or of any provincial authority affecting any right or privilege of the Protestant or Roman Catholic minority of the Queen’s subjects in relation to education.”

I put aside as entirely irrelevant here the question whether it was or was not intended by this sub-sect. 2 to confer on the Privy Council of the Dominion appellate jurisdiction from the provincial judiciary, a question the decision of which, I may say in passing, might well be influenced by the consideration that the power given to Parliament by the British North America Act to create federal courts had not at the time of the passage of the Manitoba Act been exercised.

[661] The first subject of appeal is then, any act or decision of the legislature of the province affecting any right or privilege of the minority in respect of the matters in question. Now if we are to hold, as I am of opinion we must hold, that it was not the intention of Parliament by these words so to circumscribe the legislative

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(1) [1892] A. C. 445; *ante*, p. 32.



rights conferred by them on Manitoba as to incapacitate that legislature from absolutely, and without any subjection to federal control, repealing its own enactments and thus taking away rights which it had itself conferred, the right of appeal to the Governor-General against legislative acts must be limited to a particular class of such acts, viz.: to such as might prejudice rights and privileges not conferred by the legislature itself, but rights and privileges which could only have arisen before confederation, being those described in sub-sect. 1 of sect. 22. That we must assume in the absence of express words that it was not the intention of Parliament to impose upon the Manitoba Legislature a disability so anomalous as an incapacity to repeal its own enactments, except subject to an appeal to the Governor-General in Council and possibly the intervention of the Dominion Parliament as a paramount legislature, is a proposition I have before stated.

Therefore, the right of appeal to the Governor-General in Council must be confined to acts of the legislature affecting such rights and privileges as are mentioned in the first subsection, viz.: those existing at the union when belonging to a minority, either Protestant or Catholic. Then there would also be the right of appeal from any provincial authority. I will assume that the description "provincial authority" does not apply to the courts of justice. Then these words "provincial authority" could not, as used in this sub-sect. 2 [662] of sect. 22 of the Manitoba Act, have been intended to include the provincial legislature, for it is expressly distinguished from it being mentioned alternatively with the legislature. "An appeal shall lie from any act or decision of the legislature . . . or of any provincial authority," is the language of the section. It must then apply to the provincial executive or administrative authorities. No doubt an appeal would lie from their acts or decisions, upon the ground that some right or privilege existing at the date of the admission of the province to the federal union was thereby prejudiced. In this respect Manitoba would be in the same position as Ontario and Quebec. Unlike the cases of those provinces, and also unlike the case of the two maritime provinces, Nova Scotia and New Brunswick, there would not, however, in the case of Manitoba, be an appeal to the Governor-General in Council from the act or decision of any "provincial authority," upon the ground that some right or privilege not existent at the time of union, but conferred sub-

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sequently by legislation, had been violated. This construction must necessarily result from the right of appeal against acts or decisions of provincial authorities, and against acts or decisions of the legislature, being limited to such as prejudiced the same class of rights or privileges. The wording of this subject. 2 shews clearly that only one class of rights or privileges could have been meant, and that the right of appeal was therefore to arise upon an invasion of these, either by the legislature or by a provincial authority. Then, as the impossibility of holding that it could have been intended to impose fetters on the legislature and to incapacitate it from absolutely repealing its own Acts requires us to limit the appeal against its enactments to Acts affecting rights and privileges existing at the union, it must follow that the right of appeal must be in like manner limited as regards acts or decisions of provincial [663] authorities. This, however, although it makes a difference between Manitoba and the other provinces, is not a very material one. The provincial authorities would of course be under the control of the courts; they could therefore be compelled, by the exercise of judicial authority, to conform themselves to the law. Much greater would have been the difference between Manitoba and the other provinces if we were to hold that whilst, as regards the provinces of Nova Scotia and New Brunswick, their legislatures could enact a separate school law one session and repeal it the next, without having their repealing legislation called in question by appeal, and whilst, as regards Ontario and Quebec, although rights and privileges existing at confederation were made intangible by their legislatures, yet any increase or addition to such rights and privileges which these legislatures might grant could be withdrawn by them at their own pleasure, subject to no federal revision, yet that the legislation of Manitoba, on the same subject, should be only revocable subject to the revisory power of the Governor-General in Council.

I have thus endeavoured to shew that the construction I adopt has the effect of placing all the provinces virtually in the same position, with an immaterial exception in favour of Manitoba, and it is for the purpose of demonstrating this that I have referred to appeals from the acts and decisions of provincial authorities, which are not otherwise in question in the case before us.

That the words “any provincial authority” in sub-sect. 3 of sect. 93 of the British North America Act do not include the legislature is a conclusion which I have reached not without difficulty. In interpreting the Manitoba Act, however, what we have to do is to [664] ascertain in what sense the Dominion Parliament in adopting the same expression in the Manitoba Act understood it to have been used in the British North America Act.

That they understood these words not to include the provincial legislatures is apparent from sect. 22, sub-sect. 2 of the Manitoba Act, wherein the two expressions “provincial authority” and “legislature of the province” are used in the alternative, thus indicating that in the intendment of Parliament they meant different subjects of appeal.

Again, why were the words contained in sub-sect. 3 of sect. 93 of the British North America Act “or is thereafter established by the Legislature of the Province” omitted, when that section was in other respects transcribed in the Manitoba Act. The reason it appears to me is plain. So long as these words stood with the context they had in the British North America Act they did not in any way tie the hands of the provincial legislatures as regards the undoing, alteration or amendment of their own work, for the words “any provincial authority” did not include the legislature. But when in the Manitoba Act the Dominion Parliament thought it advisable for the better protection of vested rights—“rights and privileges” existing at the union—to give a right of appeal from the legislature to the Governor-General in Council, it omitted the words “or is thereafter established by the legislature of the province,” with the intent to avoid placing the provincial legislature under any disability or subjecting it to any appeal as regards the repeal of its own legislation, which would have been the effect if sub-sect. 3 of sect. 93 of the British North America Act had been literally re-enacted in the Manitoba Act with the words “of the legislature of the province” interpolated as we now find them in subsect. 2 of the latter Act. This seems to me to shew conclusively [665] that the words “rights or privileges” in sub-sect. 2 of sect. 22 were not intended to include rights and privileges originating under provincial legislation since the union, and that the legislature of Manitoba is not debarred from exercising the common legislative right of abrogating laws which it has itself passed relating to denomi-

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national or separate schools or educational privileges, nor is such repealing legislation made subject to any appeal to the Governor General in Council.

In my opinion all the questions propounded for our opinion must be answered in the negative.

FOURNIER J. :—

By the statute 33 Vict. c. 3, sect. 2 (D), the Manitoba Act, the provisions of the British North America Act, except so far as the same may be varied by the said Act, are made applicable to the province of Manitoba, in the same way and to the like extent as they apply to the several provinces of Canada, and as if the province of Manitoba had been one of the provinces united by the British North America Act. This Act was imperialized, so to speak, by 34 Vict. c. 38 (Imp.) which declares that 32 & 33 Vict. c. 3 (D) shall be deemed to have been valid and effectual for all purposes whatsoever.

If we are now called upon to construe certain provisions of this statute, it seems to me that the same considerations will apply as if the provisions appeared in the British North America Act itself under the heading "Manitoba" and therefore as stated by the late Chief Justice of this court, Sir W. Richards, in the case of *Severn v. The Queen* (1), "in deciding important questions arising under the Act passed by the Imperial Parliament for federally uniting the provinces of Canada, Nova Scotia, and New Brunswick, [666] we must consider the circumstances under which that statute was passed, the condition of the different provinces, their relations to one another, as well as the system of government which prevailed in those provinces and countries." For convenience therefore, I will place in parallel columns the sections of the Manitoba Act and the corresponding sections of the British North America Act in relation to education, upon which we are required to give an answer.

British North America Act,  
Sect. 93.

"In and for each province  
the Legislature may exclusively

Manitoba Act, Sect. 22.

"In and for the province the  
said legislature may exclusively  
make laws in relation to educa-

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(1) 2 Can. S.C.R. 70, 87; *ante*, vol. 1, pp. 414, 430.



make laws in relation to education, subject and according to the following provisions:—

“(1) Nothing in any such law shall prejudicially affect any right or privilege with respect to denominational schools which any class of persons have by law in the province at the union :

“(2) All the powers, privileges and duties at the union by law conferred and imposed in Upper Canada on the separate schools and school trustees of the Queen’s Roman Catholic subjects shall be and the same are hereby extended to the dissentient schools of the Queen’s Protestant and Roman Catholic subjects in Quebec :

“(3) Where in any province a system of separate or dissentient schools exists by law at the union, or is thereafter established by the legislature of the province, an appeal shall lie to the Governor-General in Council from any Act or decision of any provincial authority affecting any right or privilege of the Protestant or Roman Catholic minority of the Queen’s subjects in relation to education :

“(4) In case any such provincial law as from time to time seems to the Governor-General in Council requisite for the due execution of the provisions of this section is not made, or in

tion, subject and according to the following provisions:—

“(1) Nothing in any such law shall prejudicially affect any right or privilege with respect to denominational schools which any class of persons have by law or practice in the province at the union.”

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“(2) An appeal shall lie to the Governor-General in Council from any Act or decision of the legislature of the province, or of any provincial authority, affecting any right or privilege of the Protestant or Roman Catholic minority of the Queen’s subjects in relation to education.

“(3) In case any such [667] provincial law as from time to time seems to the Governor-General in Council requisite for the due execution of the provisions of this section is not

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case any decision of the Governor-General in Council on any appeal under this section is not duly executed by the proper provincial authority in that behalf, then and in every such case, and as far only as the circumstances of each case require, the Parliament of Canada may make remedial laws for the due execution of the provisions of this section and of any decision of the Governor-General in Council."

made, or in case any decision of the Governor-General in Council on any appeal under this section is not duly executed by the proper provincial authority in that behalf, then and in every such case, and as far only as the circumstances of each case require, the Parliament of Canada may make remedial laws for the due execution of the provisions of this section, and of any decision of the Governor-General in Council under this section."

What was the existing state of things in the territory then being formed into the province of Manitoba? Rebellion, as I have already stated in the case of *Barrett v. The City of Winnipeg* (1) had thrown the people into a strong and fierce agitation, inflamed religious and national passions, and caused the greatest disorder, which rendered necessary the intervention of the Federal Government; and as matters then stood on the 2nd March, 1870, the government of Assiniboia, in order to pacify the inhabitants, appointed the Rev. Mr. Ritchot and Messrs. Black and Scott as joint delegates to confer with the Government of Ottawa, and negotiate the terms and conditions upon which the inhabitants of Assiniboia would consent to enter confederation with the Provinces of Canada.

Mr. Ritchot was instructed to immediately leave with Messrs. Black and Scott for Ottawa, in view of opening negotiations on the subjects of their mission with the Government at Ottawa.

When they arrived at Ottawa the three delegates, Messrs. [668] Ritchot, Black and Scott, received on the 25th April, 1870, from the Hon. Mr. Howe, the then Secretary of State for the Dominion of Canada, a letter informing them that the Hon. Sir John A. Macdonald and Sir George Cartier had been authorized by the Government of Canada to confer with them on the subject of their mission, and that they were ready to meet them.

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(1) 19 Can. S.C.R. 374; *ante*, p. 32.

The Rev. Mr. Ritchot was the bearer of the conditions upon which they were authorized to consent for the inhabitants of Assiniboia to enter confederation as a separate province.

These facts appear in exhibit L, Sessional Papers of Canada, 1893, 33 D., and in exhibit N of the same Sessional Paper, we see that the following conditions, articles 5 and 7, read as follows:—

“(5.) That all properties, all rights and privileges possessed be respected, and the establishing and settlement of the customs, usages and privileges be left for the sole decision of the local legislature.”

“(7.) That the schools shall be separate and that the moneys for schools shall be divided between the several denominations pro rata of their respective populations.”

Now, after negotiations had been going on, and despatches and instructions from the Imperial Government to the Government of Canada on the subject of the entrance of the Province of Manitoba into the confederation had been received, the Manitoba Constitutional Act was prepared, and sect. 22 inserted as a satisfactory guarantee for their rights and privileges in relation to matters of education, as claimed by the above articles 5 and 7. And until 1890 the inhabitants of the Province of Manitoba enjoyed these rights and privileges under the authority of this section and local statutes passed in conformity therewith.

However, it seems by the decision of the Judicial Committee of [669] the Privy Council in the case of *The City of Winnipeg v. Barrett* (1) that the delegates of the North-West and the Parliament of Canada, although believing that the inhabitants of Assiniboia had before the union “by law or by practice,” certain rights and privileges with respect to denominational schools—for the words used in sub-sect. 1 of this sect. 32 are, “which any class of persons have by law or practice in the province at the union”—had in point of fact no such right or privilege by law or practice with respect to denominational schools, and therefore that sub-sect. 1 is, so to speak, wiped out of the Manitoba Constitutional Act, having nothing to operate upon.

But if the parties agreeing to these terms of union, were in error in supposing they had by law or practice prior to the union certain rights or privileges, they certainly were not in error in trusting

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that the provincial legislature, (as the legislature of Quebec did after the union for the Protestant minority) which was being created, would forthwith settle and establish their usages and privileges and secure by law and in accordance with articles 5 and 7 of the bill of rights separate schools for the Catholics of Manitoba and would make provisions so that the moneys would be divided between the Protestant and Catholic denominations pro rata to their respective populations. These once established and secured by their own local legislature in accordance with the terms of the union, is not the minority perfectly within the spirit and the words of the constitutional Act in contending that rights and privileges so secured by an Act of the legislature are at least in the same position as rights secured to minorities in the provinces of Quebec and Ontario under sect. 93 of the British North America Act and that sub-sects. 2 and 3 were inserted in the Act so that they might be protected by the Governor-General against any subsequent legislation, by either [670] a Protestant or Catholic majority in after years ?

In the present reference, being again called upon to construe this same sect. 22, but as if sub-sect. 1 was repealed or wiped out by judicial authority, we must, I think, take into consideration the historical fact that the Manitoba Act of 1870 was the result of the negotiations with parties who agreed to join and form part of the confederation as if they were inhabitants of one of the provinces originally united by the British North America Act, and we must credit the Parliament of Canada with having intended that the words "an appeal shall lie to the Governor-General in Council from any act or decision of the legislature of the province or of any provincial authority affecting any right or privilege of the Protestant or Roman Catholic minority of the Queen's subjects in relation to education" (which are also the words used in sect. 93 of the British North America Act) should have some effect. The only meaning and effect I can give them is that they were intended as an additional guarantee or protection to the minority, either Protestant or Catholic, whichever it might happen to be, that the laws which they knew would be enacted immediately after the union by their own legislature in reference to education, would be in accordance with the terms and conditions upon which they were entering the union ; this guarantee was given so as to prevent later on interference with their rights and privileges by subsequent legislation without being subject to an appeal to the Governor-General in Council should such subsequent Act of the legislature affect any right or privilege thus secured to the Protestant or Catholic minority by their own legislature.

In my opinion the words used in sub-sect. 2: "an appeal shall [671] lie from any Act of the legislature," necessarily mean an appeal from any statute which the legislature has power to pass in relation to education if *at the time* of the passing of such statute there exists by law any right or privilege enjoyed by the minority. There is no necessity of appealing from statutes which are *ultra vires*, for the assumption of any unauthorized power by any local legislature under our system of government is not remedied by appeal to the Governor-General in Council but by courts of justice.

Then, as to the words "right or privilege" in this sub-section, they refer to some right or privilege in relation to education to be created by the legislature which was being brought into existence, and which, once established, might thereafter be interfered with at the hand of a local majority so as to affect the Protestant or Catholic minority in relation to education.

It is clear, therefore, that the Governor-General in Council has the right of entertaining an appeal by the British North America Act, as well as by sub-sect. 2 of sect. 22 of the Manitoba Act. He has also the power of considering the application upon its merits. When the application has been considered by him upon its merits, if the local legislature refuses to execute any decision to which the Governor-General in Council has arrived in the premises, the Dominion Government may then, under sub-sect. 3 of sect. 22 of the Manitoba Act, pass remedial legislation for the execution of his decision.

In construing, as I have done, the words of sub-sect. 2 of sect. 22 of the Manitoba Constitutional Act, which is, as regards an appeal to the Governor-General in Council, but a reproduction of sub-sect. 3 of sect. 93 of the British North America Act, except that the clear, unequivocal and comprehensive words, "from any act or decision of the legislature of the province," are added, I am [672] pleased to see that I am but concurring in the view expressed by Lord Carnarvon in the House of Lords on the 19th February, 1867, when speaking of this right of appeal to be granted to minorities when a local Act might affect rights or privileges in matters of education, as the following extract from Hansard's Parliamentary Debates, 3rd series, Feb. 19, 1867, shews:—

"**LORD CARNARVON.**—Lastly, in the 93rd clause, which contains the exceptional provisions to which I referred, your Lordships will observe some rather complicated arrangements in reference to education. I need hardly say that this great question gives rise to nearly as much earnestness and division of opinion on that as on

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this side of the Atlantic. This clause has been framed after long and anxious controversy in which all parties have been represented, and on conditions to which all have given their consent. It is an understanding which, as it only concerns the local interests affected, is not one that Parliament would be willing to disturb, even if in the opinion of Parliament it were susceptible of amendment; but I am bound to add, as the expression of my own opinion, that the terms of the agreement appear to me to be equitable and judicious. For the object of the clause is to secure to the religious minority of one province the same rights and privileges and protection which the religious minority of another province may enjoy. The Roman Catholic minority of Upper Canada, the Protestant minority of the Maritime Provinces, will thus stand on a footing of entire equality. But in the event of any wrong at the hand of the local majority, the minority have a right of appeal to the Governor-General in Council, and may claim the application of any remedial laws that may be necessary from the central parliament of the Confederation."

This being so, the next point of inquiry is whether the Acts of 1890 of Manitoba affect any right or privilege secured to the Catholic minority in matters of education after the union, for we have now nothing to do with the inquiry whether the Catholic minority had at the time of the union any right by law or practice, that point, as I have already stated, having been decided adversely to their contention by the decision of the Privy Council in the case of *The City of Winnipeg v. Barrett* (1). By referring to the legislation from the date of the union to 1890, it is evident that the Catholics [673] enjoyed the immunity of being taxed for other schools than their own, the right of organization, the right of self-government in this school matter, the right of taxation of their own people, the right of sharing in government grants for education, and many other rights under the statute of a most material kind. All these rights were swept away by the Acts of 1890, as well as the properties they had acquired under these Acts with their taxes and their share of the public grants for education. Could the prejudice caused by the Acts of 1890 be greater than it has been? The scheme that runs through the Acts of 1871 and 1881 up to 1890, as Lord Watson of the Privy Council is reported to have so concisely stated on the argument of the case of *The City of Winnipeg v. Barrett* (1) (which is printed in the sessional papers of Canada, 1893), appears to have been that "no rate payer shall be taxed for contribution towards

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(1) [1892] A.C. 445; *ante*, p. 32.



any school except one of his own denomination," and I will add that this scheme is clearly pointed out in articles 5 and 7 of the conditions of union above already referred to, which were the basis of the constitutional Act.

Now is this a legal right or privilege enjoyed by a class of persons? In this case the immunity from contributing to any schools other than one of its own denomination was acquired by the Catholic minority qua Catholics by statute and Catholics certainly, at the time the legislation was passed, represented a class of persons comprising at least one-third of the inhabitants of the Province of Manitoba. It is unnecessary, I think, after reading the able judgments delivered in the case of *The City of Winnipeg v. Barrett* (1), to shew by authority that the right so acquired by the Catholic minority after the Union by the Act of 1871 was a legal right, and that if it is shewn by subsequent legislation enacted by the legislature of the Province of Manitoba that there has been any interference [674] with such right, then I am of the opinion that such interference would come within the very words of this sect. 22 of the Manitoba Constitutional Act, which gives a right of appeal to the Governor-General in Council from "any act of the legislature" (words which are not in sect. 93 of the British North America Act, but are in sub-sect. 2 of sect. 22 of the Manitoba Act), affecting a right acquired by the Roman Catholic minority of the Queen's subjects in relation to education.

The only other question submitted to us I need refer to is the 4th question. Does sub-sect. 3 of sect. 93 of the British North America Act, 1867, apply to Manitoba? The answer to this question is to be found in sect. 2 of the Manitoba Act (33 Vict., c. 3) which says "On, from and after the said day on which the Order of the Queen in Council shall take effect as aforesaid, the provisions of the British North America Act, 1867, shall, except those parts thereof which are in terms made, or by reasonable intendment, may be held to be, specially applicable to, or only to affect one or more, but not the whole of the Provinces now composing the Dominion, and except so far as the same may be varied by this Act, be applicable to the Province of Manitoba in the same way, and to the like extent as they apply to the several provinces of Canada, and as if the Province of Manitoba had been one of the provinces originally united by the said Act." The Manitoba Act has not varied the British North America Act though sub-sect. 2 of sect. 22 has a somewhat more comprehensive wording than the sub-sect. 3 of sect. 93 of the British

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North America Act, in relation to appeal in educational matters. A statute does not vary or alter if it merely makes further provision, it is simply an addition to it. The 2nd sub-sect. is wider but does not vary at all from the 3rd sub-sect. of sect. 93 of the British [675] North America Act, save in this that there is an addition to it; that it includes it, and goes beyond it by adding the words "and from any act of the legislature." The 3rd sub-sect. of the British North America Act provides that in two cases there is to be an appeal. There is nothing inconsistent in the Manitoba Act which says that in all cases there shall be an appeal, it goes beyond the British North America Act, it does not vary it, but leaves it as it is and adds to it.

We see by the opinion expressed by some of the Lords of the Privy Council, how far the right of appeal extends under sect. 2 of the Manitoba Act, for in the argument on that question before the Privy Council, Sessional Papers, No. 33a, 33b, 1893, we read, at p. 134, that when Mr. Ram (counsel) was arguing on behalf of Mr. Logan in the case of *The City of Winnipeg v. Logan* (1) he said:—

"I venture to think that under sub-sect. 2 what was contemplated was this: that apart from any question, ultra vires or not, if a minority said, 'I am oppressed,' that was the party who had to come under that sect. 3 and appeal to the Government."

Lord Hennen added:—

"It has a right to appeal against any act of the legislature."

And Lord Shand:—

"Even intra vires."

This being also my opinion, I will only add that, having already stated that I think that we should read the Manitoba Constitutional Act in the light of the British North America Act, and that it was intended, as regards all civil rights in educational matters, to place the Province of Manitoba on the same footing as the Provinces of Quebec and Ontario, and that sub-sect. 1 of sect. 22 having been enacted for the purpose of protecting rights held by law or practice prior to the union, but which have been declared not to exist, I am [676] of the opinion that sub-sect. 2 of sect. 22 of the Manitoba Constitutional Act provides for an appeal to the Governor-General in Council, by memorial or otherwise, on the part of the Roman Catholic minority contending that the two Acts of the legislative assembly of Manitoba, passed in 1890, on the subject of education, are subversive of the rights and privileges of the Roman Catholic ratepayers not to be taxed for contribution towards schools, except those of their own denomination, and that such right has been acquired by statute subsequent to the union.

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(1) [1892] A. C. 445; ante, p. 32.



For the above reasons, I answer the questions submitted by His Excellency the Governor-General in Council as follows :—

“(1.) Is the appeal referred to in the said memorials and petitions, and asserted thereby, such an appeal as is admissible by sub-sect. 3 of sect. 93 of the British North America Act, 1867, or by sub-sect. 2 of sect. 22 of the Manitoba Act, 33 Vict. (1870) c. 3, Canada ?”—  
Yes.

“(2.) Are the grounds set forth in the petitions and memorials such as may be the subject of appeal under the authority of the sub-sections above referred to, or either of them ?”—Yes.

“(3.) Does the decision of the Judicial Committee of the Privy Council in the cases of *The City of Winnipeg v. Barrett* (1) and *The City of Winnipeg v. Logan* (1) dispose of or conclude the application for redress, based on the contention that the rights of the Roman Catholic minority, which accrued to them after the union, under the statutes of the province, have been interfered with by the two statutes of 1890, complained of in the said petitions and memorials ?”—No.

“(4.) Does sub-sect. 3, of sect. 93 of the British North America Act, 1867, apply to Manitoba ?”—Yes.

“(5.) Has His Excellency the Governor-General in Council power [677] to make the declarations or remedial orders which are asked for in the said memorials and petitions, assuming the material facts to be as stated therein, or has His Excellency the Governor-General in Council any other jurisdiction in the premises ?”—Yes.

“(6.) Did the Acts of Manitoba, relating to education, passed prior to the session of 1890, confer on or continue to the minority a ‘right or privilege in relation to education’ within the meaning of sub-sect. 2 of sect. 22 of the Manitoba Act, or establish a system of ‘separate or dissentient schools’ within the meaning of sub-sect. 3 of sect. 93 of the British North America Act, 1867, if said sect. 93 be found applicable to Manitoba, and if so, did the two Acts of 1890 complained of, or either of them, affect any right or privilege of the minority in such a manner that an appeal will lie thereunder to the Governor-General in Council ?”—Yes.

TASCHEREAU, J. :—

I doubt our jurisdiction on this reference or consultation. Is sect. 4 of 54 & 55 Vict. c. 25 which purports to authorize such a reference to this court for hearing “or” consideration *intra vires*

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of Parliament? By which section of the British North America Act is Parliament empowered to confer on this statutory court any other jurisdiction than that of a court of appeal under sect. 101 thereof? This court is evidently made, in the matter, a court of first instance, or rather, I should say, an advisory board of the federal executive, substituted, *pro hac vice*, for the law officers of the Crown, and not performing any of the usual functions of a court of appeal, nay, of any court of justice whatever. However, I need not, at present, further investigate this point. It has not been raised, and a similar enactment to the same import has already been [678] acted upon. That is not conclusive, it is true: but our answers to the questions submitted will bind no one, not even those who put them, nay, not even those who give them, no court of justice, not even this court. We give no judgment, we determine nothing, we end no controversy; and, whatever our answers may be, should it be deemed expedient, at any time, by the Manitoba executive to impugn the constitutionality of any measure that might hereafter be taken by the federal authorities against the provincial legislation, whether such measure is in accordance with or in opposition to the answers to this consultation, the recourse, in the usual way, to the courts of the country remains open to them. That is, I presume, the consideration, and a very legitimate one, I should say, upon which the Manitoba executive acted by refraining to take part in the argument on the reference, a course that I would not have been surprised to see followed by the petitioners, unless indeed they are assured of the interference of the federal authorities should it eventually result from this reference that, constitutionally, the power to interfere with the provincial legislation as prayed for exists. For if, as a matter of policy, in the public interest, no action is to be taken upon the petitioners' application, even if the appeal lies, the futility of these proceedings is apparent.

Assuming, then, that we have jurisdiction, I will try to give, as concisely as possible, the reasons upon which I have based my answers to the questions submitted.

In the view I take of the application made to His Excellency the Governor-General in Council by the Catholics of Manitoba, I think it better to invert the order of the questions put to us, and to answer first the fourth of these questions, that is, whether sub-sect. 3 of sect. 93 of the British North America Act applies to Manitoba. To

[679] that question the answer, in my opinion, must be in the negative. That section of the British North America Act applies to every one of the provinces of the Dominion, with the exception however of Manitoba, for the reason that, for Manitoba, in its special charter, the subject is specifically provided for by sect. 22 thereof.

The maxims *lex posterior derogat priori*, and *specialia generalibus derogant* have both here, it seems to me, their application. If it had been intended to purely and simply extend the operation of that sect. 93 of the British North America Act to Manitoba, sect. 22 of its charter would not have been enacted. The course since pursued for British Columbia and Prince Edward Island would have been followed. But where we see a different course pursued we have to assume that the difference in the law was intended. I cannot see any other reason for it, and none has been suggested. True it is that the words "or practice" in sub-sect. 1, of sect. 22, are an addition in the Manitoba charter which the Dominion Parliament desired to specially make to the analogous provision of the British North America Act, but that was no reason to word sub-sect. 2 thereof so differently as it is from sub-sect. 3 of sect. 93 of the British North America Act. Then this difference may be easily explained though its consequences may not have been foreseen; I speak cautiously and mindful that I am not here allowed to controvert or even doubt anything that has been said on the subject by the Privy Council. It is evident, to my mind, that it was simply because it was assumed by the Dominion Parliament, that separate or denominational schools had previously been, in that region, and were then, at the union, the basis and principle of the educational system, and with the intention of adapting such system to the new province, or rather of continuing it as found to exist, that, in the [680] Union Act of 1870, the words of sub-sect. 3 of sect. 93 of the British North America Act: "where in any province a system of separate or dissentient schools exists by law, at the union, or is thereafter established by the legislature of the province," were stricken out as unnecessary and inapplicable to the new province. And I do not understand that the Privy Council denies to the petitioners their right to separate schools.

However, the reason of this difference between the constitution of the province and the British North America Act cannot, in my

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view of the question, bring much assistance in the present investigation : the fact remains, whatever may have been the reason for it, that no appeal is given to the minority, in Manitoba, in relation to the rights and privileges conceded to them since the union as distinguished from those in existence at the union. They have no rights but what is left to them by the judgment in the *Barrett Case* (1) ; and, if I do not misunderstand that judgment, the appeal they now lay claim to is not, as a logical inference, thereby left to them.

And in vain now, to support their appeal, would they urge that the statute so construed is unreasonable, unjust, inconsistent and contrary to the intentions of the law giver ; uselessly would they contend that to force them to contribute pecuniarily to the maintenance of the public, non-Catholic schools is to so shackle the exercise of their rights as to render them illusory and fruitless, or that to tax, not only the property of each and every one of them individually but even their school buildings for the support of the public schools is almost ironical ; uselessly would they demonstrate the utter impossibility for them to efficaciously provide for the organization, maintenance and management of separate schools, and the essential requirements of a separate school system without [681] statutory powers and the necessary legal machinery ; ineffectively would they argue that to concede their right to separate schools, and withal, deprive them of the means to exercise that right, is virtually to abolish it, or to leave them nothing of it but a barren theory. With all these, and kindred considerations, we, here, in answering this consultation, are not concerned. The law has authoritatively been declared to be so, and with its consequences, we have nothing to do. *Dura lex, sed lex. Judex non constituitur ad leges reformandas. Non licet iudicibus de legibus judicare sed secundum ipsas.* The Manitoba legislation is constitutional, therefore it has not affected any of the rights or privileges of the minority, therefore the minority has no appeal to the federal authority. The Manitoba legislature had the right and power to pass that legislation ; therefore any interference with that legislation by the federal authority would be *ultra vires* and unconstitutional.

By an express provision of the British North America Act of 1871, it must not be lost sight of, the Dominion Parliament has not the power to, in any way, alter the Manitoba Union Act of 1870.

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(1) [1892] A. C. 445 ; *ante*, p. 32.



For these reasons I would answer negatively the fourth of the questions submitted, and say that, in my opinion, sub-sect. 3 of sect. 93 of the British North America Act does not apply to Manitoba.

I take up now the first of these questions: Does the right of appeal claimed by the petitioners exist under sect. 22 of the Manitoba Act? And here again, in my opinion, the answer must be in the negative, for the reason that it is conclusively determined, by the judgment of the Privy Council, that the Manitoba legislation does not prejudicially affect any right or privilege that the Catholics had by law or practice at the union, and if their rights and privileges mentioned in sub-sect. 2 of sect. 22 are the same rights and privileges that are mentioned in sub-sect. 1, that is to say, those existing at the union, upon which sub-sect. 3 provides for the interference, in certain cases, of His Excellency the Governor-General in Council, and it is as to such rights or privileges only that an appeal is given. The appeal given, in the other provinces, by sect. 93 of the British North America Act as to the rights or privileges conferred on a minority after the union, is, as I have remarked, left out of the Manitoba constitution. Assuming, however, that the Manitoba constitution is wide enough to cover an appeal, by the minority, upon the infringement of any of their rights or privileges created since the union, or assuming that sect. 93 of the British North America Act, sub-sect. 3, applies to Manitoba, I would be inclined to think that, by the ratio decidendi of the Privy Council, there are no rights or privileges of the Catholic minority that are infringed by the Manitoba legislation so as to allow of the exercise of the powers of the Governor in Council in the matter, as the Manitoba statutes must now be taken not to prejudicially affect any right or privilege whatever enjoyed by the Catholic community. It would seem, no doubt, by the language of both sect. 93 of the British North America Act and of sect. 22 of the Manitoba charter, that there may be provincial legislation which, though intra vires, yet might affect the rights or privileges of the minority so as to give them the right to appeal to the Governor in Council. For it cannot be of ultra vires legislation that an appeal is given. And the petitioners properly disclaiming any intention to base their application on the unconstitutionality of the Manitoba statutes,

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even for infringement of rights conferred upon them since the [683] union, urge that though the Privy Council has determined that the legislation in question does not affect the rights existing at the union so as to render it *ultra vires* yet that it does affect the rights conferred upon them by the provincial legislature since the union, so as to give them, though *intra vires*, an appeal to the Governor in Council. I fail to see, however, how this ingenious distinction, for which I am free to admit both the British North America Act and the Manitoba special charter give room, can help the petitioners. I assume here that the petitioners have an appeal upon rights or privileges conferred upon them since the union, as contradistinguished from the rights previously in existence. The case is precisely the same as if the present appeal was as to their rights existing at the union. They might argue that though the Privy Council has held this legislation to have been *intra vires* yet their right to appeal subsists, and, in fact, exists because it is *intra vires*. But what would be this ground of appeal? Because the legislation affects the rights and privileges they had at the union? And the answer would be one fatal to their appeal, as it was to their contentions in the *Barrett Case* (1), that none of these rights and privileges have been illegally affected. Now, the rights and privileges they lay claim to under the provincial legislation anterior to 1890 are, with the additions rendered necessary by the political organization of the country to enable them to exercise these rights, the same, in principle, that they had by practice at and before the union, and which were held by the Privy Council not to be illegally affected by the legislation of 1890.

And I am unable to see how, on the one hand, this legislation might be said to affect those rights so as to support an appeal and, on the other hand, not to affect the same rights so as to render it *ultra vires*.

[684] The petitioners, it seems to me, would virtually renew their impeachment of the constitutionality of the Manitoba legislation of 1890 upon another ground than the one taken in the *Barrett Case* (1), namely, upon the rights conferred upon them since the union, whilst the controversy in the *Barrett Case* (1) was limited to their rights as they existed at the union. But that legislation, as I have said, is irrevocably held to have been *intra vires*, and it is

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not open to the petitioners to argue the contrary even upon a new ground. And if it is *intra vires*, it cannot be that it has illegally affected any of the rights or privileges of the Catholic minority though it may be prejudicial to such right. And if it has not illegally affected any of those rights or privileges they have no appeal to the Governor in Council.

It has been earnestly urged on the part of the petitioners, in their attempt to distinguish the two cases, that in the *Barrett Case* (1) it was only their liability to assessment for the public schools that was in issue, and, consequently, that the decision of the Privy Council, binding though it be, does not preclude them from now taking, on appeal from the provincial legislation of 1890, the ground that this legislation sweeps away the statutory powers conceded to them under the previous statutes, and without which their establishment and administration of a separate school system is impracticable. But here again, it must necessarily be on the ground that their rights and privileges, or some of their rights and privileges, have been prejudicially affected that they have to rest their case, and from that ground they are irrevocably ousted by the judgment of the Privy Council, where not only the assessment clauses thereof, more directly in issue, but each and every one of the enactments of the statute impugned, were, as I read that judgment, held to have been and to be *intra vires*.

[685] Were it otherwise, and could the question be treated as *res integra*, it might have been possible for the petitioners to establish that they are entitled to the appeal claimed on that ground, namely, that the statutes of 1890, by taking away the rights and privileges of a corporate body vested with the powers essential to the organization and maintenance of a school system that had been granted to them by the previous statutes, are subversive of those rights and privileges and prejudicially affect them.

They might cogently urge, in support of that proposition, and might, perhaps, have succeeded in convincing me, that to take away a right, to cancel a grant, to repeal the grant of a right, to revoke a privilege, prejudicially affects that grant, prejudicially, injuriously affects that privilege. They might also perhaps have been able to convince me that the license to own real estate, the authorization to issue debentures, to levy assessments, the powers of a corporation, that had been granted to them, constituted for them rights and privileges.

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And to the objection that no appeal lies under sect. 22 of the Manitoba charter but upon rights existing at the union they might perhaps have successfully answered, either that sect. 93 of the British North America Act extends to Manitoba, or, if not, that the legislation of Manitoba in the matter, since the union, prior to 1890, should be construed as declaratory of their right to separate schools, or a legislative admission of it, a legislation required merely to secure to them the means whereby to exercise that right, and that, consequently, their appeal relates back to a right existing at the union, so as to bring it, if necessary, under the terms of sect. 22 of the Manitoba Union Act.

However, from these reasons the petitioners are now precluded. [686] If any of their rights and privileges had been prejudicially affected this legislation would be *ultra vires*; and it is settled that it is not *ultra vires*.

And the argument against their contention is very strong, that it being determined that it would have been in the power of the Manitoba legislature to establish, in 1871, at the outset of the political organization of the province, the system of schools that they adopted in 1890 by the statutes which the petitioners now complain of, it cannot be that by their adopting and regulating a system of separate schools, though not obliged to do so, they, forever, bound the future generations of the province to that policy, so that, as long at least as there would be even only one Roman Catholic left in the province, the legislature should be, for all time to come, deprived of the power to alter it, though the constitution vests them with the jurisdiction over education in the province. To deny to a legislative body the right to repeal its own laws, it may be said, is so to curtail its powers that an express article of its constitution must be shewn to support the proposition; it is not one that can be deductively admitted.

If this legislation of 1890, it may be still further argued against the petitioners' contentions, had been adopted in 1871, it would, it must now be conceded, have been constitutional, and that being so, would the Catholic minority, then, in 1871, have had a right of appeal to the Governor in Council? Certainly, that is partly the same question in a different form. But it demonstrates, put in that shape, that the petitioners have now no right of appeal. The answer to their claim would then have been that they had no appeal because none of their rights and privileges had been prejudicially affected. Now, in my opinion, they have no other rights and privileges, in the construction that these words bear in the Manitoba charter, than the rights and privileges they had in 1870. And if

[687] they would have had no appeal then, on a legislation in 1871 similar to that of 1890, they have none now if none of their rights and privileges have been prejudicially affected.

I would answer the first question in the negative. This conclusion determines my answers to the other questions submitted to the court, and, consequently, as at present advised, I would answer the six of them as follows :—

To no. 1.—“Is the appeal referred to in the said memorials and petitions, and asserted thereby, such an appeal as is admissible by sub-sect. 3 of sect. 93 of the British North America Act, 1867, or by sub-sect. 2 of sect. 22 of the Manitoba Act, 33 Vict. (1870), c. 3, Canada?” I would answer, no.

To no. 2.—“Are the grounds set forth in the petitions and memorials such as may be the subject of appeal under the authority of the sub-sections above referred to, or either of them?” I would answer, no.

To no. 3.—“Does the decision of the Judicial Committee of the Privy Council in the cases of *The City of Winnipeg v. Barrett* (1) and *The City of Winnipeg v. Logan* (1) dispose of or conclude the application for redress based on the contention that the rights of the Roman Catholic minority which accrued to them after the union under the statutes of the province have been interfered with by the two statutes of 1890, complained of in the said petitions and memorials?” I would answer, yes.

To no. 4.—“Does sub-sect. 3 of sect. 93 of the British North America Act, 1867, apply to Manitoba?” I would answer, no.

To no. 5.—“Has His Excellency the Governor-General in Council power to make the declarations or remedial orders which are asked for in the said memorials and petitions, assuming the material facts to be as stated therein, or has His Excellency the Governor-General [688] in Council any other jurisdiction in the premises?” I would answer, no.

To no. 6.—“Did the Acts of Manitoba relating to education, passed prior to the session of 1890, confer on or continue to the minority a ‘right or privilege in relation to education’ within the meaning of sub-sect. 2 of sect. 22 of the Manitoba Act, or establish a system of ‘separate or dissentient schools’ within the meaning of sub-sect. 3 of sect. 93 of the British North America Act, 1867, if said sect. 93 be found to be applicable to Manitoba; and if so, did the two Acts of 1890 complained of, or either of them, affect any right or privilege of the minority in such a manner that an appeal will lie thereunder to the Governor-General in Council?” I would answer, no.

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GWYNNE, J. :—

The questions submitted in the case stated by the order of His Excellency the Governor-General in Council for the opinion of this court are as follows :—

“ 1. Is the appeal referred to in the memorials and petitions stated in and made part of the case and asserted thereby, such an appeal as is admissible by sub-sect. 3 of sect. 93 of the British North America Act of 1867, or by sub-sect. 2 of sect. 22, of the Manitoba Act, 33 Vict. (1870) chapter 3, Canada ?

“ 2. Are the grounds set forth in the petitions and memorials such as may be the subject of appeal under the authority of the sub-sections above referred to or either of them ?

“ 3. Does the decision of the Judicial Committee of the Privy Council in the cases of *The City of Winnipeg v. Barrett* (1) and *The City of Winnipeg v. Logan* (1) dispose of or conclude the application for redress based on the contention that the rights of the Roman Catholic minority which accrued to them after the union under the statutes of the province have been interfered with by the two statutes of 1890, complained of in the said petitions and memorials.

“ 4. Does sub-sect. 3, of sect. 93, of the British North America Act 1867, apply to Manitoba ?

“ 5. Has His Excellency the Governor-General in Council power to make the declarations or remedial orders which are asked for in [689] the said memorials and petitions assuming the material facts to be as stated therein, or has His Excellency the Governor-General in Council any other jurisdiction in the premises ?

“ 6. Did the Acts of Manitoba relating to education, passed prior to the session of 1890, confer or continue a ‘ right or privilege in relation to education ’ within the meaning of sub-sect. 2, of sect. 22, of the Manitoba Act, or establish a system of ‘ separate or dissentient schools,’ within the meaning of sub-sect. 3, of sect. 93, of the British North America Act, 1867, if said section be found to be applicable to Manitoba and if so, did the two Acts of 1890 complained of, or either of them, affect any right or privilege of the minority in such a manner that an appeal will lie thereunder to the Governor-General in Council.”

The memorials and petitions referred to in and made part of the case were presented to His Excellency the Governor-General in Council in April, 1890, and in September and October, 1892 ; that of April, 1890, was signed by his Grace the Archbishop of St. Boniface and 4,266 others, members of the Roman Catholic Church.



It alleged :—

“ 1. That prior to the creation of the Province of Manitoba there existed in the territory now constituting that province a number of effective schools for children.

“ 2. That these schools were denominational schools, some of them being regulated and controlled by the Roman Catholic Church and others by various Protestant denominations.

“ 3. That the means necessary for the support of the Roman Catholic schools were supplied to some extent by school fees paid by some of the parents of the children who attended the schools and the rest was paid out of the funds of the church contributed by its members.

“ 4. That during the period referred to Roman Catholics had no interest in or control over the schools of the Protestant denominations, and the Protestant denominations had no interest in or control over the schools of the Roman Catholics ; there were no public schools in the sense of State schools. The members of the Roman Catholic Church supported the schools of their own church for the benefit of the Roman Catholic children and were not under obligation to, and did not contribute to the support of any other schools.

“ 5. That in the matter of education therefore, during the period referred to, Roman Catholics were, as a matter of custom and practice, separate from the rest of the community.”

[690] The petition then set forth sect. 22 of the Manitoba Act (33 Vict. c. 3) and proceeded as follows in paragraph 7 and following paragraphs :—

“ 7. During the first session of the Legislative Assembly of the Province of Manitoba an Act was passed relating to education, the effect of which was to continue to the Roman Catholics that separate condition with reference to education which they had previous to the erection of the province.

“ 8. The effect of the statute so far as Roman Catholics were concerned was merely to organize the efforts which Roman Catholics had previously voluntarily made for the education of their own children. It provided for the continuance of schools under the sole control and management of Roman Catholics, and of the education of their children according to the methods by which alone they believe children should be instructed.

“ 9. Ever since the said legislation and until the last session of the Legislative Assembly no attempt was made to encroach upon the rights of the Roman Catholics, so confirmed to them as above mentioned, but during said session statutes were passed, 53 Vict. caps 37 and 38, the effect of which was to deprive the Roman

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Catholics altogether of their separate condition in regard to education, to merge their schools with those of the Protestant denominations, and to require all members of the community, whether Roman Catholic or Protestant, to contribute through taxation to the support of what was therein called public schools, but which are in reality a continuation of the Protestant schools.

“10. There is a provision in the said Act for the appointment and election of an advisory board, and also for the election in each municipality of school trustees; there is also a provision that the said advisory board may prescribe religious exercises for use in schools, and that the said school trustees may, if they think fit, direct such religious exercises to be adopted in the schools in their respective districts. No further or other provision is made with reference to religious exercises, and there is none with reference to religious training.

“11. Roman Catholics regard such schools as unfit for the purposes of education, and the children of Roman Catholic parents cannot, and will not, attend any such schools. Rather than countenance such schools Roman Catholics will revert to the ordinary system in operation previous to the Manitoba Act, and will, at their own private expense, establish, support and maintain schools in accordance with their principles and their faith, although by so doing they will have, in addition thereto, to contribute to the expense of the so-called public schools.

“12. Your petitioners submit that the said Act of the Legislature [691] of the Assembly of Manitoba is subversive of the rights of Roman Catholics guaranteed and confirmed to them by the statute creating the Province of Manitoba, and prejudicially affects the rights and privileges with respect to Roman Catholic schools which Roman Catholics had in the province at the time of its union with the Dominion of Canada.

“13. That Roman Catholics are in minority in said province.

“14. The Roman Catholics of the Province of Manitoba therefore appeal from the said Act of the Legislative Assembly of Manitoba.”

The petitioners therefore prayed :—

“1. That His Excellency the Governor-General in Council may entertain the said appeal and may consider the same, and may make such provisions and give such directions for the hearing and consideration of the said appeal as might be thought proper.

“2. That it might be declared that such provincial law does prejudicially affect the rights and privileges with regard to denominational schools which Roman Catholics had by law or practice in the province at the union.



"3. That such directions might be given, and provisions made, for the relief of the Roman Catholics of the province as to His Excellency in Council might seem fit."

A report of the Minister of Justice, dated 21st March, 1891, upon the two Acts of the Legislature of the Province of Manitoba, 53 Vict. caps. 37 and 38, has also been made part of the case submitted to us, in which reference is made to the cases of *Barrett v. The City of Winnipeg* (1) and *Logan v. The City of Winnipeg* (1), then proceeding in appeal to the Supreme Court of Canada, and also to the said petition of his Grace the Archbishop of St. Boniface and others in the following terms:—

"If the appeal should be successful these Acts will be annulled by judicial decision. The Roman Catholic minority of Manitoba will receive protection and redress, the Acts purporting to be repealed will remain in operation, and those whose views have been represented by a majority of the Legislature cannot but recognise that the matter had been disposed of with due regard to the constitutional rights of the province.

"If the controversy should result in the decision of the Court of Queen's Bench (of Manitoba) being sustained the time will come for your Excellency to consider the petitions which have been pre-[692] sented by and on behalf of the Roman Catholics of Manitoba for redress under sub-sects. 2 and 3 of sect. 22 of the Manitoba Act."

The petitions of September, 1892, were two, the one of T. A. Bernier, representing himself to be acting president of the body called the National Congress, and of eleven others, members of the executive committee of the said body; and the other dated the 22nd September, 1892, was the petition of his Grace the Archbishop of St. Boniface.

In the former the petitioners set out at large the above petition of April, 1890, and the report of the Minister of Justice from which the above extract is taken, and concluded as follows:—

"That a recent decision of the Judicial Committee of the Privy Council in England having sustained the judgment of the Court of Queen's Bench of Manitoba upholding the validity of the Act aforesaid, your petitioners most respectfully represent that, as intimated in the said report of the Minister of Justice, the time has now come for your Excellency to consider the petitions which have been presented by and on behalf of the Roman Catholics of Manitoba for redress under sub-sects. 2 and 3 of sect. 22 of the Manitoba Act.

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“That your petitioners notwithstanding such decision of the Judicial Committee in England still believe that their rights and privileges in relation to education have been prejudicially affected by said Acts of the provincial legislature.

“Therefore your petitioners most respectfully and most earnestly pray that it may please your Excellency in Council to take into consideration the petitions above referred to and to grant the conclusions of said petitions and the relief and protection sought by the same.”

The petition of his Grace the Archbishop of St. Boniface sets forth the matter as alleged in the petition signed by him and others in the petition of April, 1890, and certain extracts from the said report of the Minister of Justice, March, 1891, including that above extracted, and concluding as follows : -

“8. That the Judicial Committee of Her Majesty’s Privy Council has sustained the decision of the Queen’s Bench.

“9. That your petitioner believes that the time has now come for your Excellency to consider the petitions which have been pre-[693] sented by and on behalf of the Roman Catholics of Manitoba for redress under sub-sects. 2 and 3 of sect. 22 of the Manitoba Act as it has become necessary that the federal power should be resorted to for the protection of the Roman Catholic minority.”

And the petition prayed that His Excellency the Governor-General in Council might entertain the appeal of the Roman Catholics of Manitoba and might consider the same and might make such provisions and give such directions for the hearing and consideration of the said appeal as might be thought proper and that such directions might be given and provisions made for the relief of the Roman Catholics of the Province of Manitoba as to His Excellency in Council might seem fit.

These petitions are framed upon the contention and assumption that the facts as stated in the petitions as to the rights and privileges of Roman Catholics in Manitoba in relation to education at the time of the creation of the province entitled them to procure, by appeals to His Excellency in Council under sect. 22, of the Manitoba Act, the annulment and repeal of Provincial Acts 53 Vict. caps. 37 and 38, notwithstanding that these Acts had been declared by the judgment of the Judicial Committee of the Privy Council in England to have been and to be Acts quite within the jurisdiction of the Legislature of Manitoba to enact. The petition of October, 1892, is however framed with a further contention. It is signed by his Grace the Archbishop of St. Boniface, T. A. Bernier as president of the body called the National Congress, James

E. P. Prendergast as mayor of St. Boniface, J. Allard, O. M. I., V.G., John S. Ewart and 137 others. The petition sets out verbatim the matters alleged in the first twelve paragraphs of the above petition of April, 1890, and it then proceeds :—

[694] “13. Your petitioners further submit that the said Acts of the Legislative Assembly of Manitoba are subversive of the rights and privileges of Roman Catholics provided for by the various statutes of the said Legislative Assembly prior to the passing of the said Acts and affect the rights and privileges of the Roman Catholic minority of the Queen’s subjects in the said province in relation to education, so provided for as aforesaid, thereby offending both against the British North America Act and the Manitoba Act.”

And the petition prayed as follows :—

“Your petitioners therefore pray :

“1. That Your Excellency the Governor-General in Council may entertain the said appeal and may consider the same and may make such provisions and give such directions for the hearing and consideration of the said appeal as may be thought proper.

“2. That it may be declared that the said Acts 53 Vict. cap. 37 and 38, do prejudicially affect the rights and privileges with regard to denominational schools which Roman Catholics had by law or practice in the province at the union.

“3. That it may be declared that the said last mentioned Acts do affect the rights and privileges of the Roman Catholic minority of the Queen’s subjects in relation to education.

“4. That it may be declared that to Your Excellency the Governor-General in Council it seems requisite that the provisions of the statutes in force in the Province of Manitoba prior to the passage of the said Acts should be re-enacted in so far at least as may be necessary to secure to the Roman Catholics in the said province the right to build, maintain, equip, manage, and conduct these schools in the manner provided for by the said statutes, to secure to them their proportionate share of any grant made out of the public funds for the purposes of education, and to relieve such members of the Roman Catholic Church as contribute to such Roman Catholic schools from all payments or contribution to the support of any other schools, or that the said Acts of 1890 should be so modified or amended as to effect such purpose.

“5. And that such further or other declaration or order may be made as to Your Excellency the Governor-General in Council shall, under the circumstances, seem proper, and that such directions may be given, provisions made and all things done in the premises for

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the purpose of affording relief to the said Roman Catholic minority in the said province, as to Your Excellency in Council may seem meet.

“And your petitioners will ever pray,” etc.

The pretension of the petitioners therefore appears to be that [695] sect. 22 of the Manitoba Act entitled the petitioners, notwithstanding the judgment of the Privy Council in England in *The City of Winnipeg v. Barrett* (1) and *The City of Winnipeg v. Logan* (1), to invoke and to obtain the interference of His Excellency the Governor-General in Council to compel, in effect, a repeal by the provincial legislature of the said Acts of 53rd Vict., and the re-enactment of the statutes in force in the province in relation to education at the time of the passing of the Acts 53rd Vict. upon the grounds following:—

1. That the Acts of 53rd Vict. prejudicially affect the rights and privileges with regard to denominational schools which Roman Catholics had enjoyed previous to the erection of the province; and

2. That the said Acts 53rd Vict. prejudicially affect the rights and privileges of Roman Catholics in the province, provided for by various statutes of the provincial legislature enacted prior to the passing of the Acts of 53rd Vict. Under these circumstances, the case which has been submitted to us has been framed in the shape in which it has been for the purpose of presenting to us purely abstract questions of law.

The learned members of the Judicial Committee of the Privy Council who advised Her Majesty upon the appeals in the cases of *The City of Winnipeg v. Barrett* (1) and *The City of Winnipeg v. Logan* (1), adopting the evidence of the Archbishop of St. Boniface as to the rights and privileges in relation to denominational schools enjoyed by Roman Catholics before the passing of the Manitoba Act in the territory by that Act erected into the Province of Manitoba, say in their report:—

“Now, if the state of things which the Archbishop describes as existing before the union had been a system established by law, what would have been the rights and privileges of the Roman Catholics with respect to denominational schools? They would have had by law the right to establish schools at their own expense, [696] to maintain their schools by school fees or voluntary contributions, and to conduct them in accordance with their own religious tenets. Every other religious body which was engaged in a similar work at the time of the union would have had precisely the same



right with respect to their denominational schools. Possibly this right, if it had been defined or recognised by positive enactment, might have had attached to it, as a necessary or appropriate incident, the right of exemption from any contribution under any circumstances to schools of a different denomination. But, in their Lordships' opinion, it would be going much too far to hold that the establishment of a national system of education upon a non-sectarian basis is so inconsistent with the right to set up and maintain denominational schools that the two things cannot exist together, or that the existence of one necessarily implies or involves immunity from taxation for the purpose of the other."

They then minutely review the provisions of the provincial statutes enacted prior to the passing of the Acts of 1890, and of the Acts of 1890 themselves, and proceed as follows :—

"Notwithstanding the Public School Acts, 1890, Roman Catholics and members of every other religious body in Manitoba are free to establish schools throughout the province ; they are free to maintain their schools by school fees or voluntary subscriptions ; they are free to conduct their schools according to their own religious tenets without molestation or interference. No child is compelled to attend a public school. No special advantage other than the advantage of a free education in schools conducted under public management is held out to those who do attend."

To this it may be added, that Roman Catholics are not excluded from the advisory board erected by the Acts. They are equally eligible as Protestants to such board, and as members thereof can equally with Protestants exert their influence upon the board with regard to religious exercises in the public schools; and in short Roman Catholics and Protestants of every denomination are in every respect placed, by the Acts, in precisely the same position. The judgment of the Privy Council then proceeds as follows :—

"But then it is said that it is impossible for Roman Catholics or for members of the Church of England (if their views are correctly [697] represented by the Bishop of Rupert's Land, who has given evidence in Logan's case) to send their children to public schools where the education is not superintended and directed by the authorities of their Church, and that therefore Roman Catholics and members of the Church of England who are taxed for public schools, and at the same time feel themselves compelled to support their own schools, are in a less favourable position than those who can take advantage of the free education provided by the Act of 1890. That may be so. But what right or privilege is violated or prejudicially affected by the law ? It is not the law that is in fault.

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It is owing to religious convictions which everybody must respect, and to the teaching of their Church, that Roman Catholics and the members of the Church of England find themselves unable to partake of advantages which the law offers to all alike."

The judgment then summarily rejects the contention that the public schools created by the Acts of 1890 are in reality Protestant schools and concludes in declaring and adjudging that those Acts do not prejudicially affect the rights and privileges enjoyed by Roman Catholics in the territory now constituting the Province of Manitoba, prior to the passing of the Manitoba Act, taking those rights and privileges to have been as represented by the Archbishop of St. Boniface, and even assuming them to have been secured or conferred by positive law, and so that they are not enacted in violation of sect. 22 of the Manitoba Act, but are within the exclusive jurisdiction of the provincial legislature to enact.

Their Lordships of the Privy Council, in *The City of Winnipeg v. Barrett* (1) and *The City of Winnipeg v. Logan* (1) put a construction upon this sect. 22 which, independently, is to my mind sufficiently apparent, but which I quote as a judicial enunciation of their Lordships' opinion. They say:—

"Their Lordships are convinced that it must have been the intention of the legislature to preserve every legal right or privilege with respect to denominational schools which any class of persons practically enjoyed at the time of the union."

The language of the section is, I think, sufficiently clear upon [698] that point, and all its sub-sections are enacted for the purpose of securing the single object, namely, the preservation of existing rights. The section enacts:—

"22. In and for the province the said legislature may exclusively make laws in relation to education, subject and according to the following provisions:—

'1. Nothing in any such law shall prejudicially affect any right or privilege with respect to denominational schools which any class of persons have by law or practice in the province at the union.

"2. An appeal shall lie to the Governor-General in Council from any act or decision of the legislature of the province or of any provincial authority affecting any right or privilege of the Protestant or Roman Catholic minority of the Queen's subjects in relation to education.

"3. In case any such provincial law as from time to time seems to the Governor-General in Council requisite for the due execution



of the provisions of this section is not made, or in case any decision of the Governor-General in Council, or any appeal under this section, is not duly executed by the proper provincial authority in that behalf, then and in every such case, and as far only as the circumstances of each case require, the Parliament of Canada may make remedial laws for the due execution of the provisions of this section and of any decision of the Governor-General in Council under this section."

If any law should be passed in violation of the qualification contained in the first sub-section upon the general jurisdiction conferred by the section, to make laws in relation to education, that is to say, in case any Act should be passed by the provincial legislature prejudicially affecting any right or privilege with respect to denominational schools which any class of persons had by law or practice in the province at the union, such an Act would be ultra vires of the provincial legislature to enact, and would therefore have no force; and as it was to preserve these rights and privileges with respect to denominational schools, whatsoever they were, which existed at the time of the union, that sect. 22 was enacted, it is obvious, I think, that it is against such an Act of the legislature and against any decision of any provincial authority, acting in an administrative [699] capacity, prejudicially affecting any such right that the appeal is given by the 2nd sub-sect., and so likewise the remedies provided in the 3rd sub-sect. relate to the same rights and privileges, and to the better securing the enjoyment of them. The 2nd and 3rd sub-sects. are designed as means to redress any violation of the rights preserved by the section. To subject any Act of the legislature to the appeal provided in the 2nd sub-sect., and to the remedies provided in sub-sect. 3, it is obvious that such an Act must be passed in violation of the condition subject to which any jurisdiction is conferred upon the provincial legislature to make laws in relation to education, and must therefore be ultra vires of the provincial legislature, for the language of the section expressly excludes from the provincial legislature all jurisdiction to pass such an Act. The jurisdiction, whatever its extent may be, which the provincial legislature has over education being declared to be exclusive, there can be no appeal to any other authority against an Act passed by the legislature under such jurisdiction, and any Act of the legislature passed in violation of any of the provisions in sect. 22, subject to which the jurisdiction of the legislature is restricted, is not within their jurisdiction and is therefore ultra vires. The appeal, therefore, which is given by sub-sect. 2 must be only concurrent with the right of all persons injuriously affected by such an Act to raise in the

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ordinary courts of justice the question of its constitutionality. If any doubt could be entertained upon this point it is concluded, in my opinion, by their Lordships of the Privy Council in *The City of Winnipeg v. Barrett* (1) and *The City of Winnipeg v. Logan* (1), in the following language :—

“ At the commencement of the argument a doubt was suggested as to the competency of the present appeal in consequence of the so-[700] called appeal to the Governor General in Council provided by the Act. But their Lordships are satisfied that the provisions of sub-sects. 2 and 3 do not operate to withdraw such a question as that involved in the present case from the jurisdiction of the ordinary tribunals of the country.”

If an Act of the provincial legislature which is impeached upon the suggestion of its prejudicially affecting such rights and privileges as aforesaid is not made by sect. 2 of the Manitoba Act ultra vires of the provincial legislature it cannot be open to appeal under sub-sect. 2 of that section. The section does not profess to confer, upon the executive of the Dominion or the Dominion Parliament, any power of interference whatever with any Act in relation to education passed by the provincial legislature of Manitoba which is not open to the objection of prejudicially affecting some right or privilege with respect to denominational schools, which some class of persons had by law or practice in the province at the union ; all Acts of the provincial legislature not open to such objection are declared by the section to be within the exclusive jurisdiction of the provincial legislature ; and as the Acts of 1890 are declared by their Lordships not to be open to such objection, and to have therefore been within the jurisdiction of the provincial legislature to pass, those Acts cannot, nor can either of them, be open to any appeal under sub-sect. 2 of this section.

It has been suggested, however, that the rights and privileges, whether conferred or recognised by the Acts of the legislature of Manitoba in force prior to and at the time of the passing of the Acts of 1890 and which were thereby repealed, were within the protection of sect. 22 and that this was a matter not under consideration in *The City of Winnipeg v. Barrett* (1) and *The City of Winnipeg v. Logan* (1) ; and that therefore the right of appeal under sub-sect. 2 of sect. 22 against such repeal does exist notwithstanding the decision of the Privy Council in *The City of Winnipeg v. Barrett* (1) and *The City of Winnipeg v. Logan* (1). This

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(1) [1892] A. C. 445 ; ante, p. 32.

contention appears to have been first raised expressly in the petition presented in October 1892, although it is impliedly comprehended in the paragraphs of the petition of April 1890, which is repeated verbatim in that of October, 1892, wherein the Act of the provincial legislature of 1871 is relied upon as having had—"the effect to continue to Roman Catholics the separate condition with reference to education which they had enjoyed previous to the creation of the province, and in so far as Roman Catholics were concerned merely to organize the efforts which the Roman Catholics had previously voluntarily made for the education of their own children and for the continuance of schools under the sole control and management of Roman Catholics, and of the education of their children according to the methods by which alone they believe children should be instructed."

But this statute of 1871, and all the statutes passed by the legislature of Manitoba in relation to education prior to 1890, were specially brought under the notice of their Lordships of the Privy Council and were fully considered by them in their judgment as already pointed out, and if the repeal by the Act of 1890 of the Acts of the provincial legislature then in force in relation to education constituted a violation of the condition contained in sect. 22, subject to which alone the jurisdiction of the provincial legislature to make laws in relation to education was restricted, it is inconceivable to my mind that their Lordships, having all these statutes before them, could have pronounced the Acts of 1890 to be within the jurisdiction of the provincial legislature to pass. But, however this may be, there is nothing, in my opinion, in the Manitoba Act which imposed any obligation upon the legislature of Manitoba to pass the Acts, which are repealed by the Acts of 1890, or which placed those Acts when passed in any different position [702] from that of all Acts of a legislature, which constitute the will of the legislature for the time being, and only until repealed,—and nothing which warrants the contention that the repeal of those Acts by the Acts of 1890 constituted a violation of the condition in sect. 22, subject to which the jurisdiction of the legislature was restricted; and nothing, therefore, which gives any appeal against such repeal.

Whether or not sub-sect. 3 of sect. 93 of the British North America Act of 1867, assuming that section to apply to the Province of Manitoba, would have the effect of restraining the powers of the provincial legislature in such manner as to deprive them of jurisdiction to repeal the said Acts it is unnecessary to inquire, for that section does not, in my opinion, apply to the Province of Manitoba, special provision upon the subject of educa-

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tion being made by sect. 22 of the Manitoba Act. For the above reasons, therefore, the questions submitted in the case must, in my opinion, be answered as follows :—

The 1st, 2nd, 4th and 5th in the negative ; the 3rd in the affirmative, and the 6th, which is a complex question, as follows :—

The Acts of 1890 do not, nor does either of them, affect any right or privilege of a minority in relation to education within the meaning of sub-sect. 2 of sect. 22 of the Manitoba Act in such manner that an appeal will lie thereunder to the Governor-General in Council. The residue of the question is answered by the answer to question no. 4.

KING, J. :—

It may be convenient first to regard the constitutional provisions respecting education as they affect the original provinces of the confederation. By sect. 93 of the British North America Act it is provided that in and for such province the legislature may exclusively make laws in relation to education, subject and according to the provisions of four sub-sections. The first sub-section provides that nothing in any such law shall prejudicially affect any right or privilege with respect to denominational schools which any class of persons had by law in the province at the union.

The second sub-section extends to the dissentient schools of the Queen's Protestant and Roman Catholic subjects in Quebec all the powers, privileges and duties which were at the union conferred and imposed by law in Upper Canada (Ontario) on the separate school trustees of the Queen's Roman Catholic subjects there.

The third sub-section gives to the Governor-General in Council the right on appeal to decide whether or not an act or decision of any provincial authority affects any right or privilege of the Protestant or Roman Catholic minority in relation to education enjoyed by them under a system of separate or dissentient schools in the province, whether such system of separate or dissentient schools shall have existed by law at the union or shall have been thereafter established by the legislature of the province.

The fourth sub-section provides that if upon appeal the Governor-General in Council shall decide that the educational right or privilege of the Protestant or Roman Catholic minority has been so affected, and if the provincial legislature shall not pass such laws as from time to time seem to the Governor-General in Council requisite for the due execution of the provisions of the section, or if the proper provincial authority shall not duly execute the



decision of the Governor-General in Council on the appeal, then in every such case, but only so far as the circumstances of each case require, the Parliament of Canada may make remedial laws for the due execution of the provisions of this section and of any decision [704] of the Governor-General in Council under the section. In other words, if the requisite remedy, either by Act of the legislature or act or decision of the proper provincial authority in that behalf, is not applied then concurrent legislative authority to the requisite extent is given to the Dominion Parliament ; and to this extent the legislative authority of the provincial legislature ceases to be exclusive.

The terms "separate" and "dissentient" schools used in the above sub-sections were derived from the school systems of Upper and Lower Canada. At the union the two larger confederating provinces, Upper Canada (Ontario) and Lower Canada (Quebec) had each a system of separate or dissentient schools, the Canadian method of dealing with the question of religion (as between Protestants and Roman Catholics) in the public school system.

In Upper Canada the Roman Catholics were in the minority, and in Lower Canada the Protestants were in a still smaller minority. In Upper Canada there was a non-denominational public system, with a right in the Roman Catholics to a separate denominational system. In Lower Canada the general public system was markedly Roman Catholic with a right to the Protestant minority to schools of their own. In Upper Canada the minority schools were called "separate" schools ; in Lower Canada "dissentient" schools. It was because the powers and privileges of the Upper Canada minority in relation to their schools were greater than those of the Lower Canada minority that by the terms of union these were agreed to be assimilated by adopting for Quebec the more enlarged liberties of the Upper Canada law ; and this was given effect to by sub-sect. 2 of sect. 93 already cited.

In the case of the two other of the original confederating provinces, Nova Scotia and New Brunswick, there was not in either a system of separate or dissentient schools.

The bounds of the Dominion have been since enlarged ; in 1870, by the admission of the North-West Territory and Rupert's Land ; in 1871, by the admission of British Columbia, and in 1872, by the admission of Prince Edward Island. In the case of British Columbia and Prince Edward Island (these being established and independent provinces) the terms of union were agreed upon by the governments and legislatures of Canada and the provinces respectively. In each case the above recited provisions of the British

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North America Act respecting education were adopted and made applicable without change. In neither of these newly added provinces was there a system of separate or dissentient schools.

With regard to the North-West Territories and Rupert's Land there was no established government and legislature representing the people, and after the acquisition of the North-West Territories and Rupert's Land, the Parliament of Canada, after listening to representations of representative bodies of people, passed an Act for the creation and establishment of the new Province of Manitoba out of and over a portion of the newly acquired territory ; and it is with regard to this Act, (33 Vict. c. 3), that the present questions arise.

By sect. 2 it is declared that :—

“The provisions of the British North America Act shall, except those parts thereof which are in terms made, or by reasonable intendment may be held to be, specially applicable to or only to affect one or more, but not the whole, of the provinces now composing the Dominion, and except so far as the same may be varied by this Act, be applicable to the Province of Manitoba, in the same way and to the like extent as they apply to the several provinces of Canada, and as if the Province of Manitoba had been one of the provinces originally united by the said Act.”

[706] The Act then deals specially with a number of matters, as for instance the constitution of the executive and legislative authority, the use of both the English and French languages in legislative and judicial proceedings, financial arrangements and territorial revenue, etc., and by sect. 22 makes the following provision respecting education :—

“22. In and for the province the said legislature may exclusively make laws in relation to education, subject and according to the following provisions :—

“(1.) Nothing in any such law shall prejudicially affect any right or privilege with respect to denominational schools which any class of persons have by law or practice in the province at the union.

“(2.) An appeal shall lie to the Governor-General in Council from any act or decision of the legislature of the province, or of any provincial authority affecting any right or privilege of the Protestant or Roman Catholic minority of the Queen's subjects in relation to education.

“(3.) In case any such provincial law as from time to time seems to the Governor-General in Council requisite for the due execution of the provisions of this section is not made, or in case any decision of the Governor-General in Council on any appeal under this sec-



tion is not duly executed by the proper provincial authority in that behalf, then, and in every such case, and as far only as the circumstances of each case require, the Parliament of Canada may make remedial laws for the due execution of the provisions of this section and of any decision of the Governor-General in Council under this section."

Sub-sect. 1 of sect. 22 of the Manitoba Act differs from sub-sect. 1 of sect. 93 of the British North America Act of 1867, in the addition of the words "or practice" after the words "which any class of persons have by law."

In *The City of Winnipeg v. Barrett* (1) the Judicial Committee of the Privy Council held that the Manitoba Education Act of 1890 did not prejudicially affect any right or privilege with respect to denominational schools which the Roman Catholics practically enjoyed at the time of the establishment of the province.

[707] The 2nd sub-sect. of sect. 93, British North America Act, has, of course, no counterpart in any of the sub-sections of sect. 22, Manitoba Act, because sub-sect. 2, sect. 93, British North America Act, is a clause specially applicable to and affecting only the Province of Quebec.

The 3rd sub-sect. of sect. 93, British North America Act, and the 2nd sub-sect. of sect. 22, Manitoba Act, deal with the like subject, viz. : the right of the religious minority to appeal to the Governor-General in Council in case of their educational rights or privileges being affected ; but here again there are differences.

One difference is, that whereas by the clause in the British North America Act the appeal lies from an "act or decision of any provincial authority" affecting any right or privilege of the Protestant or Roman Catholic minority in relation to education, in the Manitoba Act the appeal lies from "any act or decision of the legislature of the province" as well as from that of any provincial authority. This was either an extension of the right of appeal or the getting rid of an ambiguity, according as the words "any provincial authority" as used in the British North America Act did not or did extend to cover "acts of the provincial legislature."

The addition in sub-sect. 1 of the Manitoba Act of the words "or practice" and the addition in sub-sect. 2 of the words "of the legislature of the province," would (so far as the context of these words is concerned) seem to shew an intention on the part of Parliament to extend the constitutional protection accorded to minorities by the British North America Act, or at all events to make no abatement therein.

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Then there is another difference between the language of sub-sect. 3 of the British North America Act and that of sub-sect. 2 [708] of the Manitoba Act. The former begins as follows: "Where in any province a system of separate and dissentient schools exists by law at the union, or is thereafter established by the legislature of the province, an appeal shall lie," etc., while in the Manitoba Act the introductory part is omitted, and the clause begins with the words, "an appeal shall lie," etc., the two clauses being thereafter identical, with the exception that in the Manitoba Act, (as already mentioned), the appeal in terms extends to complaints against the effect of acts of the legislature as well as of acts or decisions of any provincial authority.

After this reference to points of distinction, I cite sub-sect. 2 of the Manitoba Act again in full, for sake of clearness:—

"An appeal shall lie to the Governor-General in Council from any act or decision of the legislature of the province or of any provincial authority affecting any right or privilege of the Protestant or Roman Catholic minority of the Queen's subjects in relation to education."

On the one side it is contended that in order to give the appeal, the rights or privileges of the religious minority need to have been acquired and to have existed prior to and at the time of the passage of the Act. On the other side it is contended that it is sufficient if the rights and privileges exist at the time of their alleged violation irrespective of the time when they were acquired.

In the argument before the Judicial Committee of *The City of Winnipeg v. Barrett* (1), a shorthand report of which was submitted to Parliament last session (No. 11 Sessional Papers), Sir Horace Davey, counsel for the City of Winnipeg, argued that sub-sect. 2 does not relate to anything but what is *ultra vires* under sub-sect. 1. He says (p. 43):—

"I cannot for myself frame the proposition which would lead to the inference that sub-sect. 2 was intended to deal with cases which [709] were *intra vires*, and I beg leave to observe that it would be contrary to the whole scope and spirit of this legislation to provide for Parliament intervening, not where the provincial parliament has acted beyond its powers, that I could conceive, but to allow the Dominion Parliament to intervene, not to correct mistakes where the provincial legislature had gone wrong and exceeded their power."

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(1) [1892] A. C. 445; *ante*, p. 32.

In an interruption at this point by their Lordships, Lord Macnaghten asks :—

“Supposing some rights were created after the union, and then legislation had taken those rights away?”

This question is not directly answered, but afterwards (p. 44) Sir Horace thus continues :—

“It all comes back to the same point, that the Protestant and Roman Catholic minority have a right to come with a grievance to the Governor-General. What is that grievance? Why, that they are deprived of some right or privilege which they ought to have and are entitled to enjoy. If they are not entitled by law to enjoy it they are not deprived of anything, and it would be an extraordinary system of legislation, having regard to the nature of this Act, to say that the Dominion parliament has in certain cases to sit by way of a court of appeal from the provincial parliament, not to correct mistakes where the provincial parliament has erroneously legislated on matters not within its jurisdiction, but on matters of policy. If that be the effect to be given to these sub-sections, I venture to submit to your Lordships that it will have rather startling consequences, and it will for the first time make the legislature of the Dominion parliament a court of appeal or give them an appeal from the exercise of the discretion of the provincial parliament, or in other words, it will place the provincial parliament in the position that it will be liable to have its decisions overruled by the Dominion parliament, and therefore in a position of inferiority.”

I have quoted at great length because of the strong presentation by eminent counsel of that view, and to shew that the attention of their Lordships was powerfully drawn to the provisions of sub-sect. 2. The full report shews that all the sub-sections of the two sections of the two Acts were exhaustively discussed. .

In the judgment their Lordships say that :—

“Sub-sects. 1, 2, and 3 of sect. 22 of the Manitoba Act, 1870, differ but slightly from the corresponding sections of sect. 93 of the [710] British North America Act, 1867. The only important difference is that in the Manitoba Act in sub-sect. 1 the words ‘by law’ are followed by the words ‘or practice’ which do not occur in the corresponding passage in the British North America Act, 1867.”

There would be a marked and very considerable difference between the corresponding clauses, if in the one case rights and privileges of the religious minority were recognised as subjects of protection whenever acquired, while in the other case they were not recognised as subjects of protection unless they existed at the time of the passing of the constitutional Act.

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Not wanting to put undue stress upon this, let us look at the clauses for ourselves. In sub-sect. 1, Manitoba Act, there is an express limitation as to time; the rights and privileges in denominational schools that are saved are such as existed, by law or practice, at the union. But in sub-sect. 2 nothing is said about time at all; and the natural conclusion upon a reading of the two clauses together is that, with regard to the rights and privileges referred to in the latter clause, the time of their origin is immaterial. Such also is the ordinary and natural meaning of sub-sect. 2, regarded by itself. Read by itself it extends to cover rights and privileges existent at the time of the act or thing complained of. The existence of the right, and not the time of its creation, is the operative and material fact. And this agrees with the corresponding provisions of the British North America Act, where sub-sect. 1 refers to rights, etc., acquired before or at union, while sub-sect. 3, in terms, covers rights, etc., acquired at any time. In any other view there was clearly no necessity to add the words "or any act of the legislature" in the remedial provision of the Manitoba Act, for such act would be wholly null and void under sub-sect. 1.

[711] There is, indeed, an undeniable objection to treating as an appealable thing the repeal by a legislature of an Act passed by itself. Ordinarily all rights and privileges given by Act of Parliament are to be enjoyed *sub modo*, and are subject to the implied right of the same legislature to repeal or alter if it chooses to do so. But the fundamental law may make it otherwise. An illustration of this is afforded by the constitution of the United States, which prohibits the States, but not Congress, from passing any law impairing the obligation of contract, and this has been held to prevent the state legislatures from repealing or materially altering their own Acts conferring private rights, when such rights have been accepted. It does not extend to Acts relating to government, as, for instance, to public officers, municipal incorporations, etc., but it extends to private and other corporations, educational or otherwise, and also to Acts exempting incorporated bodies, by special Act, from rates or taxes. These are irrepealable, and the constitutional provision has been found onerous.

It is certainly anomalous, under our system and theory of parliamentary power, that a legislature may not repeal or alter in any way an Act passed by itself.

Still, weighty as this consideration is, I can give no other reasonable interpretation to the Act in question than that, under the constitution of Manitoba, as under the constitution of the Dominion, the exercise by the provincial legislature of its undoubted powers



in a way so as to give rights and privileges by law to the minority in respect of education, lets in the Dominion Parliament to concurrent legislative authority for the purpose of preserving and continuing such rights and privileges, if it sees fit to do so.

By the British North America Act it was not clear whether the words "act or decision of any provincial authority," covered the [712] case of an act of the provincial legislature, or were confined to administrative acts, but in the Manitoba Act the words explicitly extend to an Act of that legislature.

Any ambiguity in sub-sect. 2 of the Manitoba Act is, I conceive, to be resolved in the light of the corresponding provisions of the British North America Act. As the provisions of the British North America Act are to be applicable, unless varied, I think it reasonable that ambiguous provisions in the special Act should be construed in conformity with the general Act.

Passing, however, from it as a matter of construction, it does not seem reasonable that Parliament, in forming, in 1870, a constitution for Manitoba, intended to disregard entirely constitutional limitations such as were three years before established as binding upon the original members of the confederation. On the contrary, by the addition of the words "or by practice" in sub-sect. 1, and of the words "or any act of the legislature" in sub-sect. 2; and by the provision of sect. 23 providing for the use of the French and English languages in the courts and legislature, there is manifested a greater tenderness for racial and denominational differences. Further, unless sub-sect. 2 has the meaning suggested, the entire series of limitations imposed by sub-sects. 1, 2 and 3 are entirely inoperative. For the Judicial Committee has in effect declared that no right or privilege in respect of denominational schools existed prior to the union, either by law or practice, and therefore there was nothing on which sub-sect. 1 could practically operate; and as there was clearly no system of separate or dissentient schools established in Manitoba by law prior to the union, the provisions of sub-sects. 2 and 3 are inoperative if the rights and privileges in relation to education are to be limited to rights and privileges before the union.

[713] There is no doubt that this construction limits the powers of the legislature and restrains the exercise of its discretion, but the same thing may be said of the effect of an appeal against "any act or decision of any provincial authority" in Nova Scotia or New Brunswick, in case either of such provinces were to adopt a system of separate schools. The legislature might not choose to pass the remedial legislation necessary to execute the decision of the Gover-

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nor-General in Council, and the Dominion Parliament could then exercise its concurrent power of legislation in effect overriding the legislative determination of the provincial legislature. The provision may be weak, one-sided, as giving finality to a chance legislative vote in favour of separate schools, inconsistent with a proper autonomy, and without elements of permanence, but if it is in the constitutional system it must receive recognition in a court of law.

Assuming then that clause 2 covers rights and privileges whensoever acquired, the next question is as to the meaning of the words "rights and privileges of the Protestant or Roman Catholic minority in relation to education?" Here again, I think, we are to go to clause 3 of sect. 93, British North America Act. I think that the reference is to minority rights under a system of separate schools, and that it is essential that the complaining minority should have had rights or privileges under a system of separate or dissentient schools existing by law at the union or thereafter established by the legislature of the province. The generality of the words under clause 2 of the Manitoba Act is to be explained by clause 3, sect. 93, British North America Act, and to have the same meaning as the corresponding words in it.

The two remaining questions then, are: Was a system of separate or dissentient schools established in Manitoba prior to the passage of the Manitoba Education Act of 1890? And, have any rights or privileges of the Roman Catholic minority in relation thereto been prejudicially affected?

One of the learned judges of the Queen's Bench of Manitoba thus succinctly summarizes the school legislation of Manitoba in force at the time of the passing of the Act of 1890:—

"Under the school Acts in force in the province previous to the passing of the Public School Act of 1890, there were two distinct sets of public or common schools, the one set Protestant and the other Roman Catholic. The board of education, which had the general management of the public schools, was divided into two sections, one composed of the Protestant members and one of the Roman Catholic members, and each section had its own superintendent. The school districts were designated Protestant or Roman Catholic, as the case might be. The Protestant schools were under the immediate control of trustees elected by the Protestant ratepayers of the district, and the Catholic Schools in the same way were under the control of trustees elected by the Roman Catholic ratepayers; and it was provided that the ratepayers of a district should pay the assessments that were required to supplement the legislative grant to the schools of their own denomination, and that



in no case should Protestant ratepayers be obliged to pay for a Roman Catholic school, or a Catholic ratepayer for a Protestant school."

I would only add that assessments were to be ordered by the ratepayers (Catholic or Protestant, as the case might be) of the school district, and that the trustees were empowered in many cases to collect the rates themselves, instead of making use of the public collectors. The trustees were empowered to employ teachers exclusively who should hold certificates from the section of the board of education of their own faith. By the Act of 1871 the board of education was composed equally of Protestants and Roman Catholics, but by the Act of 1881 the proportion was 12]Protestants to 9 Roman Catholics.

Now, the system of education established by the Act of 1881 was [715] not in terms and eo nomine a system of separate or dissentient schools, and if the constitutional provision requires that they should be such in order to come within the Act, then the minority did not have the requisite rights and privileges in respect of education. As to this, I have had doubts arising from the opinion that, where rights and privileges have no other foundation than the legislative authority, whose subsequent acts in affecting them are impeached, the restraint upon the general grant of legislative authority should be applied only where the case is brought closely within the limitation. At the same time we are to give a fair and reasonable construction to a remedial provision of the constitution, and are to regard the substance of the thing. Now the Roman Catholics were in the minority in 1881, and are still, and a system of schools was established by law, under which they had the right to their own schools—Catholic in name and fact—under the control of trustees selected by themselves, taught by teachers of their own faith, and supported, in part, by an assessment ordered by themselves upon the persons and property of Roman Catholics, and imposed, levied and collected as a portion of the public rates, the persons and property liable to such rate being at the same time exempt from contribution to the schools of the majority, *i. e.*, Protestant schools. This, although not such in name, seems to me to have been essentially a system of separate or dissentient schools, of the same general type as the separate school system of Ontario, and giving therefore to the minority rights and privileges in relation to education in the sense of sub-sect. 2, sect. 22, Manitoba Act, and sub-sect. 3, sect. 93, British North America Act.

It is true that the schools of the majority were Protestant schools, and that the majority had the same right as the minority, but I do

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[716] not think that this renders the minority schools any the less essentially separate schools of the Roman Catholics. In Quebec the majority schools are distinctly denominational.

Then, was the right and privilege of the Roman Catholic minority in this system of separate schools prejudicially affected by the Act of 1890? And if so, to what extent?

In the judgment of the Judicial Committee in *The City of Winnipeg v. Barrett* (1), speaking of the right there claimed on behalf of the Roman Catholics that the Act of 1890 had prejudicially affected the rights and privileges which they had by practice at the time of the union, their Lordships say:—

“Now if the state of things which the Archbishop describes as existing before the union had been established by law, what would have been the rights and privileges of the Roman Catholics with respect to denominational schools? They would have had by law the right to establish schools at their own expense, to maintain their schools by school fees or voluntary contributions, and to conduct them in accordance with their own religious tenets. Every other religious body which was engaged in a similar work at the time of the union would have had precisely the same right with respect to their denominational schools. Possibly this right, if it had been defined or recognised by positive enactment, might have had attached to it as a necessary or appropriate incident, the right of exemption from any contribution under any circumstances to schools of a different denomination. But, in their Lordships’ opinion, it would be going much too far to hold that the establishment of a national system of education upon an unsectarian basis is so inconsistent with the right to set up and maintain denominational schools that the two things cannot exist together, or that the existence of one necessarily implies or involves immunity from taxation for the purpose of the other.”

The rights and privileges of the denominational minority under the Act of 1881 and amending Acts, were different from the assumed rights in denominational schools which the same class had by practice at the time of union. It could not be said to be merely [717] “the right to establish schools at their own expense, to maintain their schools by school fees or voluntary contributions and to conduct them in accordance with their own religious tenets”; it was a right as Roman Catholics by law, to establish schools and to maintain them through the exercise by them of the state power of taxation, by the imposition, levying and collecting of rates upon the persons and property of all Roman Catholics, such persons and pro-

perty being at the same time exempted from liability to be rated for the support of the public schools of the majority, then denominated and being Protestant schools. By the Act of 1890 the Protestant schools are abolished equally with the Roman Catholic schools, and a system of public schools set up which is neither Protestant nor Roman Catholic, but unsectarian. The question then is whether the language of their Lordships is applicable to this state of things, and whether or not it can be said (changing their Lordships' language to suit the facts) that the establishment of the national system of education upon an unsectarian basis is so inconsistent with the right to set up and maintain by the aid of public taxation upon the denominational minority, a system of denominational schools, that the two cannot co-exist; or that the existence of the system of denominational minority schools (supposing it still in existence) necessarily implies or involves immunity from taxation for the purpose of the other. It rather seems to me that no reasonable system of legislation could consistently seek to embrace these two things, viz: 1st, the support of a system of denominational schools for the minority, maintainable through compulsory rating of the persons and property of the minority; and 2nd, the support of a general system of unsectarian schools, through the compulsory rating of all persons and property, both of the majority and the minority. The effect of such a scheme would be to impose [718] a double rate upon a part of the community for educational purposes. The logical result of this view would be that by the establishment of a general non-sectarian system (as well as by the abrogation of the separate school system) the rights and privileges as previously given by law to the denominational minority in respect of education were necessarily affected. Of course the minority would obtain equality by giving up their schools; but the present inquiry at this point is whether a right acquired by law to maintain a system of separate schools has been affected by an Act which takes away the legal organization and status of such schools, and their means of maintenance, by the repeal of the law giving these things, and which subjects the persons and property of the denominational minority to an educational rate for general non-sectarian schools, instead of leaving them subjected to an educational rate for the support of the separate and denominational schools. It is true that by the Act of 1881 and amending Acts, the exemption was an exemption from contribution to the Protestant schools, and the schools under the Act of 1890 are not Protestant schools; but the substantial thing involved in the exemption under the Acts of 1881 and amending Acts was, that the ratepayer to the support of the

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Catholic schools should not have to pay rates for the support of the schools established by the rest of the community, but should have their educational rates appropriated solely to the support of their own schools. This was an educational right or privilege accorded to them in relation to education under a system of separate schools established by law, which the legislature, if possessing absolute or exclusive authority to legislate on the subject of education, without limitation or restraint, might very well withdraw, abrogate or materially alter, but which, under the constitutional limitations of [719] the Manitoba Act, can be done only subject to the rights of the minority to seek the intervention of the Dominion parliament, through the exercise of the concurrent legislative authority that thereupon becomes vested in such parliament upon resort being first had to the tribunal of the Governor-General in Council. Although there are points of difference between this case and what would have been the case if the prior legislation of Manitoba had established a system of separate schools following precisely the Ontario system, I cannot regard the difference as other than nominal, and I treat this case as though the Act of 1881 and amending Acts distinctly established a system of separate schools, giving for the general public a system of undenominational public schools, and to the Catholic minority the right to a system of separate schools. In such case I do not see how the passing of such an Act as the Act of 1890 could fail to be said (by abolishing the separate schools) to affect the rights and privileges of the minority in respect of education. With some change of phraseology, and some change of method, I think that what has been done in the case before us is essentially the same. If the clauses of the Manitoba Act are to have any meaning at all, they must apply to save rights and privileges which have no other foundation originally than a statute of the Manitoba legislature. The constitutional provision protects the separate educational status given by an Act of the legislature to the denominational minority. The view that the effect of this is to restrain the proper exercise by the legislature of its power to alter its own legislation, is met by the opposite view that there is no improper restraint if it is a constitutional provision, and that in establishing a system of separate schools the legislature may well have borne in mind the possibly irrepealable character of its legislation [720] in thereby creating rights and privileges in relation to education. I therefore answer the questions of the case as follows :—

1. "Is the appeal referred to in the said memorials and petitions, and asserted thereby, such an appeal as is admissible by sub-sect. 3



of sect. 93 of the British North America Act, 1867, or by sub-sect. 2 of sect. 22 of the Manitoba Act, 33 Vict. (1870), c. 3, Canada?"—Yes.

2. "Are the grounds set forth in the petitions and memorials such as may be the subject of appeal under the authority of the sub-sections above referred to, or either of them?"—Yes.

3. "Does the decision of the Judicial Committee of the Privy Council in the cases of *The City of Winnipeg v. Barrett* (1) and *The City of Winnipeg v. Logan* (1) dispose of or conclude the application for redress based on the contention that the rights of the Roman Catholic minority which accrued to them after the union, under the statutes of the province, have been interfered with by the two statutes of 1890, complained of in the said petitions and memorials?"—No.

4. "Does sub-sect. 3 of sect. 93 of the British North America Act, 1867, apply to Manitoba?"—Yes, to the extent as explained by the above reasons for my opinion.

5. "Has His Excellency the Governor-General in Council power to make the declarations or remedial orders which are asked for in the said memorials and petitions, assuming the material facts to be as stated therein, or has His Excellency the Governor-General in Council any other jurisdiction in the premises?"—Yes.

6. "Did the Acts of Manitoba relating to education, passed prior to the session of 1890, confer on or continue to the minority a 'right or privilege in relation to education,' within the meaning of sub-sect. 2 of sect. 22 of the Manitoba Act, or establish a system [721] of 'separate or dissentient schools,' within the meaning of sub-sect. 3 of sect. 93 of the British North America Act, 1867, if said sect. 93 be found applicable to Manitoba; and if so, did the two Acts of 1890 complained of, or either of them, affect any right or privilege of the minority in such a manner that an appeal will lie thereunder to the Governor-General in Council?"—Yes.

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(1) [1892] A. C. 445; *ante*, p. 32.

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## PRIVY COUNCIL.

J.C.\*

TENNANT ..... *Plaintiff;*

1892

AND

July 21, 22,  
23;THE UNION BANK OF CANADA ..... *Defendant.*

1893

July 26, 29;  
Dec. 9.*On Appeal from the Court of Appeal for Ontario.*

[Reported [1894] A. C. 31.]

*British North America Act, s. 91, sub-s. 15 ; s. 92, sub-s. 13—Validity of Dominion Bank Act (46 Vict. c. 120)—Negotiability of Warehouse Receipts—Construction.*

Although warehouse receipts granted to itself by a firm which has not the custody of any goods but its own, are not negotiable instruments within the meaning of the Mercantile Amendment Act (c. 122 of the Revised Statutes), *held*, that the Dominion Bank Act (46 Vict. c. 120), while it was in force dispensed with that limitation, validated such receipts, and transferred to the indorsees thereof the property comprised therein : — *practically.*

*Held*, further, that the Bank Act was *intra vires* of the Dominion Parliament.

Sect. 91, sub-sect. 15, of the British North America Act, 1867, gives to that Parliament power to legislate over every transaction within the legitimate business of a banker, notwithstanding that the exercise of such power interferes with property and civil rights in the province (see sect. 92, sub-sect. 13), and confers upon a bank privileges as a lender which the provincial law does not recognise.

The legislation of the Dominion Parliament, so long as it strictly relates to the subjects enumerated in sect. 91, is of paramount authority even though it trenches upon the matters assigned to the provincial legislature by sect. 92.

*Cushing v. Dupuy* (5 App. Cas. 409 ; ante vol. 1, p. 252) followed.

\*Present at the first argument :—LORD WATSON, LORD HOBHOUSE, LORD MORRIS, SIR RICHARD COUCH, and Mr. SHAND. Present at the second argument :—THE LORD CHANCELLOR, LORD WATSON, LORD HOBHOUSE, LORD MACNAGHTEN, LORD MORRIS, LORD SHAND, and SIR RICHARD COUCH.



APPEAL from a decree of the Court of Appeal (Jan. 8th 1892),(1); affirming a decree of the Chancellor of the Province (June 4th, 1890) which dismissed the appellant's action with costs.

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The facts and proceedings are stated in the judgment of their Lordships. The question in controversy was as to the validity of the warehouse receipts therein mentioned for the purpose of creating and passing title to the goods comprised therein. In the Courts below the course of judicial opinion was as follows: The Chancellor held that the dealings in question had been substantially between the insolvents and the bank direct, and not between the bank and Peter Christie as a principal. He held that under the Dominion Bank Act Peter Christie, as the indorser of the warehouse receipts, was the agent of the insolvents within the meaning of the Act, and as such could transfer a valid title to the bank by re-indorsing such receipts to them.

*receipts  
valid*

In appeal, Hagarty, C. J. held that, apart from the receipts, the bank acquired a valid title by virtue of the agreement of October 1887; and that the receipts gave a valid title apart from such agreement.

*receipts  
valid*

Osler, J. A. held that the receipts were valid under the Dominion Statute on the ground that the insolvents, as mill owners, were within sect. 54 of the Act, and that, as they were given in pursuance of a provision to that effect at the time the advances were made, they came within the saving clause of sect. 53.

*receipts  
valid*

MacLennan, J. A. held that by virtue of the agreement of October, 1887, Peter Christie acquired an equitable interest in the lumber as soon as the advances were made.



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The receipt of the 17th of November, 1888, was valid under the Dominion Act, and it was immaterial under the Act whether it passed to the bank direct from the insolvents or through the intervention of Peter Christie. Besides, the receipts gave a valid title apart from either the provincial or the Dominion statutes.

*reported*

Burton, J. A. dissented. He held that the dealings in question were between the bank and Peter Christie, and not between the bank and the insolvents; that the receipt of the 12th of July, 1888, was not a warehouse receipt within the meaning of the Bank Act, because the logs therein mentioned were not and did not purport to be then warehoused or stored in any place, but were in transit. Even if it were a warehouse receipt within the meaning of the Act, it could only be valid on the assumption that Peter Christie, as stated therein, was the owner of the goods covered by it, which was not the case. As regards the later receipts, no promise to the bank to grant receipts, made contemporaneously with the [33] advances was proved either in the case of Peter Christie or of the insolvents. He held that Peter Christie did not acquire under the Ontario Act any property under the receipts and consequently could not transfer any to the bank, not being an agent of the insolvents within the meaning of sect. 53, sub-sect. 3, of the Bank Act.

McCarthy, Q.C., (of the Canadian bar) and Gore, for the appellant, contended that, as pointed out in the judgment of Burton, J. A., the counsel for the bank had at the trial expressly stated that they claimed title under the Bank Act, and not under the agreement of the 1st of October, 1887, or otherwise, and therefore could not on appeal be allowed to set up a different case. Their title,

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if any, depended on the provisions of the Bank Act, and not otherwise. There was no evidence of any dealing either between the bank and the insolvents, or between the bank and Peter Christie, such as would entitle the bank to rely on any of the receipts as having been given in pursuance of any promise made to the bank contemporaneously with any advances. The so-called warehouse receipts were not such within the meaning either of the Ontario Act or the Bank Act. On the true construction of the Ontario Act Peter Christie acquired no title to the goods by virtue of those receipts, and whether he did so or not he could not pass title to the bank. Reference was made to sects. 53 and 54 of the Bank Act, and it was contended that thereunder the bank had no right to retain the property in suit against the appellant. Such sections should be strictly construed, because the authority to transfer property by receipts of this description is in contravention of the general law against secret conveyances and works great hardship upon creditors who give credit in ignorance of their existence: see c. 125 of the Revised Statutes. This c. 125 applies to all warehouse receipts which do not come strictly within the terms of the Bank Act; and under it there must be change of possession or registration to validate an assignment. See *Todd v. Liverpool and London Globe Insurance Company* (1); *Bank of British North America v. [34] Clarkson* (2). Warehouse receipt does not, under the Bank Act, mean a receipt given to the owner of the goods by himself. Further, the provisions of sects. 53 and 54 were ultra vires the Dominion Parliament. This point had not been argued in the Courts below, having

(1) 18 U. C. C. P. 192; 20 U. C. C. P. 182.  
C. P. 523.



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been concluded as regards the Courts of the colony by *Merchants' Bank of Canada v. Smith* (1), which held that the Dominion Banking Act, 1871 (34 Vict. c. 5), s. 46, was within the powers of that Parliament.

*Robinson, Q.C.*, (of the Canadian bar), *Symons* with him, for the respondents, was first heard as to the merits on the assumption that the Bank Act was valid:—

It was contended that the appellant could have no better right of action, in respect of the matters complained of, than the insolvents had. These latter could not be heard to allege that the receipts were defective in form and to impeach their validity. They were under contract to give warehouse receipts valid within the meaning of the Bank Act or otherwise and could be compelled to perform their agreement. The receipts in question were authorized by the Bank Act, and the bank had a valid title as indorsee thereof to the property in suit. So far as the Dominion Act was at variance with the Ontario Mercantile Amendment Act (see sect. 14 et seq. of the latter) the Dominion Act must prevail. But even apart from the Bank Act the respondent was entitled. The agreement of the 1st October, 1887, continued as a binding contract after the payment of the claim of the Federal Bank. The insolvents and Peter Christie were both bound by it. Under it Peter Christie had a valid lien on the property in suit, and the benefit of that lien passed to the bank. With regard to the Chattel Mortgages Act cited on the other side (i. e., c. 125), it does not apply to an equitable right, which this is if not within the Bank Act. Reference was made to *Clark-*

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(1) 28 Grant 629; 8 App. Rep. 15; 8 Can. S. C. R. 512; *ante*, vol. 1, p. 828.



son v. *Ontario Bank* (1); *Lumsden v. Scott* (2); *Burland v. Moffatt* (3); *Banks v. Robinson* (4); *Coyne v. Lee* (5); *Holroyd v. Marshall* (6); *Brown v. Bateman* (7); [35] *Citizens Insurance Company v. Parsons* (8); *Merchants' Bank v. Smith* (9); *Reeve v. Whitmore* (10); *Federal Bank of Canada v. Canadian Bank of Commerce* (11); *In re Coleman* (12); *Dominion Bank v. Davidson* (13).

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*McCarthy* Q.C., replied, referring to *Bank of Toronto v. Perkins* (14); *McAllister v. Forsyth* (15).

The case then stood over till the 26th of July, 1893, when the second argument took place, limited to the question whether sects. 53 and 54 of the Bank Act were *ultra vires* the Dominion Parliament.

*McCarthy*, Q.C., and *Gore*, contended that they were so :—

The onus was on the other side to shew that this Act was authorized by the terms of sect. 91 of the British North America Act, 1867 : see *L'Union St. Jacques de Montreal v. Belisle* (16). The real question is whether the provisions in dispute are admissible under the head of banking, or whether they relate to property and civil rights in the Province. It was contended that they came within art. 13 of sect. 92. Reference was made to *Citizens Insurance Company v. Parsons* (17); *Mer-*

(1) 15 App. Rep. 166; *ante*, vol. 4, p. 499.

(2) 4 Ont. Rep. 323.

(3) 11 Can. S. C. R. 76.

(4) 15 Ont. Rep. 618, 623.

(5) 14 App. Rep. 503.

(6) 10 H. L. C. 191.

(7) L. R. 2 C. P. 272.

(8) 4 Can. S. C. R. 215; 7 App. Cas. 96; *ante*, vol. 1, p. 265.

(9) 8 Can. S. C. R. 512.

(10) 33 L. J. (Ch.) 63.

(11) 13 Can. S. C. R. 384, 394.

(12) 36 U. C. Q. B. 559, 581.

(13) 12 App. Rep. 90.

(14) 8 Can. S. C. R. 603.

(15) 12 Can. S. C. R. 1.

(16) L. R. 6 P. C. 31; *ante*, vol. 1, p. 63.

(17) 7 App. Cas. 96; *ante*, vol. 1, p. 265.

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*chants' Bank v. Smith* (1). See also *Quirt v. The Queen* (2); *Reg. v. Robertson* (3); *Pigeon v. Recorder's Court and City of Montreal* (4).

Sects. 91 and 92 must be read together, and the power of the Dominion Parliament in regard to banking operations must be so exercised as not to interfere with property and civil rights in the Province. Regulations with regard to the validity and effect of warehouse receipts clearly relate to property and civil rights. They are not negotiable instruments in favour of private lenders [36] by the law of the province, and it was not the intention of sect. 91 to authorize privileges being conferred on banks which are not recognised by the provincial law. The same objection would not apply to disabilities being imposed on banks in comparsion with private lenders, for it would not be to the same extent an interference with property and civil rights.

Reference was also made to *Cushing v. Dupuy* (5); *Clarkson v. Ontario Bank* (6); *Hodge v. The Queen* (7); *Colonial Building Association v. Attorney-General of Quebec* (8).

*Sir Horace Davey*, Q.C., and *Robinson*, Q.C., (of the Canadian bar), for the respondent, contended that the provisions of the Bank Act were within the powers of the Dominion Parliament. They related strictly to banking operations and were intended to protect and facilitate advances by bankers to their customers by

(1) 28 Grant 629; 8 App. Rep. 15; 8 Can. S. C. R. 512; *ante*, vol. 1, p. 828.

(2) 19 Can. S. C. R. 510.

(3) 6 Can. S. C. R. 52, 55.

(4) 17 Can. S. C. R. 495; *ante*, vol. 4, p. 442.

(5) 5 App. Cas. 409; *ante*, vol. 1, p. 252.

(6) 15 App. Rep. 166; *ante*, vol. 4, p. 499.

(7) 9 App. Cas. 117; *ante*, vol. 3, p. 144.

(8) 9 App. Cas. 157; *ante*, vol. 3, p. 118.



authorizing loans on warehouse receipts. The subject of the enactment is reserved exclusively to the Parliament of the Dominion by sect. 91, and even if the subject can also be brought within any of the sub-sections of sect. 92, still the power of the Dominion is paramount: see *Cushing v. Dupuy* (1). The power exercised in this case was never questioned till 1880, in *Smith v. Merchants' Bank of Canada* (2).

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With regard to the documents called warehouse receipts, they were first authorized by a Canadian Statute in 1859 (22 Vict. c. 20), which applied both to banks and individuals. Then came the Act of 1867, sect. 91, of which assigned to the exclusive jurisdiction of the Dominion Parliament the subjects of the regulation of trade and commerce, banking, incorporation of banks, bills of exchange, and promissory notes. Since that Act the validity and effect of such instruments, in connection with banks, has been dealt with by the Dominion Parliament. As regards individuals, the same instruments have been regulated by the provincial legislature: see statutes of Canada, 24 Vict. c. 23, 29 Vict. c. 19; Dominion Acts, 31 Vict. c. 11, 33 Vict. c. 11, 34 Vict. c. 5, [37] 43 Vict. c. 22; and Revised Statutes of Ontario, (1877), c. 116, and (1887) c. 122.

*McCarthy*, Q.C., replied.

The judgment of their Lordships was delivered by  
 LORD WATSON:—

Christie, Kerr & Co., sawmillers and lumberers at Bradford, in the Province of Ontario, became insolvent in April, 1889. The Union Bank of Canada, respondents

(1) 5 App. Cas. 409; *ante*, vol. 1, p. 252.

(2) 28 Grant 629; 8 App. Rep. 15; 8 Can. S. C. R. 512; *ante*, vol. 1, p. 828.



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in this appeal, subsequently took possession of and removed a quantity of lumber which was stored in the yard of the firm at Bradford. This action was brought against the respondents, in December, 1889, for damages in respect of their alleged conversion of the lumber, by Mickle, Dymont & Son, personal creditors of the insolvent firm, in the name of James Tennant, as assignee or trustee of the firm's estate, by whom they were duly authorized to sue, in his name, for their own exclusive use and benefit.

Christie, Kerr & Co., to whom it may be convenient to refer as the firm, had a timber concession in the county of Simcoe, where, according to the course of their business, the pine wood was felled and cut into logs, which were marked with the letters "C.K.," the initials of the firm. The logs were then conveyed, chiefly by water, to their mill at Bradford, where they were sawn and stored for sale.

In order to obtain funds for carrying on their trade during the season of 1888, the firm, in October, 1887, entered into a written agreement with Peter Christie, son of Alexander Christie, its senior partner, who agreed to advance the money necessary, upon receiving a lien by way of security upon all the timber cut or manufactured by the firm. On the other hand, the firm undertook to do everything that was necessary in order to make such lien effectual, and for that purpose to execute any documents which might be required.

In pursuance of that agreement promissory notes were granted by Peter Christie, which the Federal Bank of Canada discounted, under an arrangement by which they were to receive warehouse receipts covering [38] all the timber belonging to the firm. Peter Christie

Fed. Bank 1) Peter

assigned to the bank all right and benefit which he had  
 — under the agreement of October, 1887. The course of  
 dealing with the bank was, that the firm granted ware-  
 house receipts to themselves, which they indorsed to  
 Peter Christie, by whom they were indorsed to the bank. 1893  
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The Federal Bank went into liquidation in June, 1888,  
 at which date their advances amounted to about \$50,000.  
 In order to meet the claim of the liquidator, Alexander  
 Christie applied for accommodation to the respondents, *— Union Bank*  
 who agreed to give it, upon terms which were arranged  
 between him and Mr. Buchanan, their manager. The  
 agreement was verbal; and its terms, which are of con-  
 siderable importance in this case, appear from the follow-  
 ing statements made by Alexander Christie in the course  
 of his evidence, which are substantially corroborated by  
 Mr. Buchanan, and are nowhere contradicted: "That  
~~we~~ and Peter Christie should give <sup>his</sup> notes, that Christie,  
 Kerr & Co. and A. R. Christie should indorse them, and  
 that there should be a warehouse receipt covering all  
 the logs that they had, and the lumber that was to be  
 manufactured from them." "The intention was to give  
 the security of the logs and of the lumber as it was  
 manufactured." "We were to give them a receipt at  
 once upon the whole of the logs, and as the logs pro-  
 gressed we made a continuation to where they were."  
 "Warehouse receipts were to be furnished until the debt  
 was paid."

There was not, as in the case of the Federal Bank, any  
 assignment to the respondents of Peter Christie's rights  
 under the agreement of October, 1887. It is clear, from  
 the account which he gives of the transaction, that  
 Alexander Christie dealt with the respondents, as the  
 representative of his firm, and also as representing his



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son Peter, from whom he held a power of attorney. ]  
Peter Christie took no part, personally, in any of the transactions, either with the Federal Bank or with the respondents. From first to last, so far as his interests were concerned, all arrangements were made, and all documents connected with them, whether promissory notes or warehouse receipts, were executed and subscribed by his father, on his behalf.

[39] Upon the faith of the agreement the respondents made advances to the amount of \$52,600 upon promissory notes of Peter Christie, indorsed to them by his attorney and also by the firm. On the 20th June, 1888, they received a warehouse receipt for seventy thousand pine saw logs, marked "C.K.," which were described as then stored in the lakes St. Jean and Couchiching, en route to Bradford mill. These logs represented the whole pine timber which had been cut for transportation to Bradford during the season of 1888 ; and as they arrived at their destination and were sawn up, fresh receipts were given to the respondents, containing a description of the timber in its manufactured state. Portions of the lumber were from time to time sold by the firm, with the consent of the respondents, and the proceeds applied in reduction of their advances. 4.

The last of the series of receipts deposited as security with the respondents is dated the 1st of January, 1889, by which time all the logs covered by the first receipt of the 20th of June, 1888, had reached Bradford, and had been converted into lumber. It includes the whole of the timber forming the original subject of the security which then remained unsold, and in the possession or custody of the firm. Though not in precisely the same form as the rest, it may be taken as a specimen, because it was



not contended that the differences of form were material.  
It runs thus :

“The undersigned acknowledges to have received from Christie, Kerr & Co., owners of the goods, wares and merchandise herein mentioned, and to have now stored in the premises known as the Bradford sawmill yard, adjoining the village of Bradford, in the county of Simcoe, the following goods, wares and merchandise, viz.:—Five millions eight hundred and fifty-three thousand nine hundred and twenty-four feet of lumber, one hundred and ninety-three thousand of shingles, all marked ‘C.K.’ and manufactured during season 1888 out of saw logs cut in the townships of Oakley and Hindon, and transported to Bradford mill and cut there, which goods, wares and merchandise are to be delivered pursuant to the order of the said Peter Christie to be indorsed hereon, and are to be kept in store till delivered pursuant to such order.

“[40] This is intended as a warehouse receipt within the meaning of the statute of Canada, intituled ‘An Act relating to Banks and Banking,’ and the amendments thereto, and within the meaning of all other Acts and laws under which a bank of Canada may acquire a warehouse receipt as a security.”

This receipt was, like its predecessors, signed by the firm, and by them indorsed to Peter Christie, and was then indorsed on his behalf by Alexander Christie, and delivered to the respondents. — *Un. Bank.*

It is not matter of dispute that the timber of which the respondents took possession, after the insolvency of the firm, was included, either as saw logs or as lumber, in all the receipts which they received as security. But it does not appear to their Lordships that these receipts

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could be regarded as negotiable instruments carrying the property of the timber if their effect depended upon the provisions of the Mercantile Code which is contained in the Revised Statutes of Ontario 1887.

The Mercantile Amendment Act (c. 122 of the Revised Statutes) deals with warehouse receipts and other mercantile documents, which are effectual to transmit the property of goods without actual delivery. That statute not only recognises the negotiability of warehouse receipts by custodiers who are not the owners of the goods; it extends the privilege to receipts by one who is both owner and custodier, but that only in cases where the grantor of the receipt is, from the nature of his trade or calling a custodier for others as well as himself, and therefore in a position to give receipts to third parties. The receipts in question do not comply with the requirements of the Act, because it is neither averred nor proved, that the firm, in the course of their business, had the custody of any goods except their own.

It may also be noticed that c. 125 of the Revised Statutes enacts that when goods are transferred by way of conveyance or mortgage, possession being retained by the transferor, the deed of conveyance or mortgage, if not duly registered, shall be absolutely null and void as against creditors of the grantor or mortgagor.

In these circumstances, certain provisions of the Bank Act which was passed by the legislature of the Dominion [41] (46 Vict. c. 120), and is specially referred to in the receipts held by the respondents, become important. Although now repealed, the Act was in force during the whole period of these transactions; and, if competently enacted, its provisions must, in so far as they are applicable, govern the rights of parties in this litigation.



— Sect. 45 provides that the bank shall not, either directly or indirectly, lend money or make advances upon the security or pledge of any goods, wares or merchandise, except as authorized by the Act.

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Sect. 53, sub-sect. 2, authorizes the bank to acquire and hold any warehouse receipt or bill of lading as collateral security for the payment of any debt incurred in its favour, in the course of its banking business. The document so acquired vests in the bank "all the right and title of the previous holder or owner thereof, or of the person from whom such goods, wares and merchandise were received or acquired by the bank, if the warehouse receipt or bill of lading is made directly in favour, of the bank; instead of to the previous holder or owner of such goods, wares and merchandise." Sub-sect. 3 of the same clause provides that if the previous holder of such warehouse receipt or bill of lading is the agent of the owner, the bank shall be vested with all the right and title of the owner, subject to his right to have the goods re-transferred to him, upon payment of the debt for which they are held in security by the bank.

Sect. 54, which deals specially with the case of the custodier and owner of the goods being one and the same person enacts that:—

"If any person who grants a warehouse receipt or bill of lading is engaged in the calling, as his ostensible business, of keeper of a yard, cove, wharf or harbour, or of warehouseman, miller, saw-miller, maltster, manufacturer of timber, wharfinger, master of a vessel, or other carrier by land or by water, or by both, curer or packer of meat, tanner, dealer in wool or purchaser of agricultural produce, and is at the same time the owner of the goods, wares and merchandise mentioned in such warehouse



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receipt or bill of lading, every such warehouse receipt or bill of lading, and the right and title of the bank thereto and to the goods, wares and merchandise mentioned [42] therein, shall be as valid and effectual as if such owner, and the person making such warehouse receipt or bill of lading were different persons."

These enactments go beyond the provisions of sect. 16 of the Mercantile Amendment Act. They omit the limitation of the provincial statute which requires, in order to validate a warehouse receipt by a custodier who is also owner, that the trade or calling in which he is ostensibly engaged must be one which admits of his granting receipts on behalf of other owners whose goods are in his possession.

The Chancellor of Ontario dismissed the suit with costs; and the Court of Appeal affirmed his decision. Upon the evidence before them all the learned judges, with one exception, came to the conclusion that the transaction was substantially one between the firm and the respondents, and that Peter Christie's position was really that of an intermediary; and consequently that the respondents had a right, against the firm, to demand and receive warehouse receipts for the timber in security for their advances. Burton, J. A., was of opinion that the respondents must be held to have dealt with Peter Christie alone; that the receipts, in his hands, were not valid either according to provincial law, or under the provisions of the Bank Act, and that his indorsation could not pass any interest in the timber to the respondents.

In the view which he took of the real character of the transaction, the Chancellor held that the receipts were effectual, mainly on the ground that Peter Christie, in

indorsing them, ought to be regarded as the agent of the firm within the meaning of sect. 53, sub-sect. 3, of the Bank Act. Hagarty, C. J., and Maclellan, J., who with Osler, J., constituted the majority of the Appeal Court, held that the receipts, having been given directly to the respondents by the firm, under an obligation to that effect, were made effectual by the provisions of the Bank Act. They also held that, assuming the receipts not to be within the protection of the Bank Act, Peter Christie had, as between himself and the firm, an equitable lien on the timber which passed to the respondents; and also that they had the same rights against the trustee of the insolvent firm as they had against the firm itself. Osler, J., whilst agreeing that the respondents dealt directly [43] with the firm, examined the case on the contrary hypothesis, and held that, even in that view, the receipts were validated by the Bank Act, and carried the property of the timber to the respondents. = *union bank*

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In the Courts below, the appellant pleaded that the provisions of the Bank Act, with respect to warehouse receipts, in so far as they differ from the provisions of the Mercantile Amendment Act, were *ultra vires* of the Dominion Legislature. The plea was not discussed, because it was admittedly at variance with the decision of the Supreme Court of Canada in *Merchants' Bank of Canada v. Smith* (1), which was a precedent binding on provincial tribunals. The case was therefore disposed of by the Chancellor and the Appeal Court upon the footing that the provisions of the Bank Act were not open to challenge.


At the first hearing of this appeal, the whole points arising in the case were fully and ably argued by counsel

(1) 8 Can. S. C. R. 512; *ante*, vol. 1, p. 828.



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with the exception of the plea taken by the appellant against the validity of the Dominion Act. Further discussion at the time was prevented by the *Labrador Case*, which had been specially set down for the consideration of a full Board.

X Their Lordships, having considered the argument which had been addressed to them, came to the conclusion that the majority of the learned judges were right in holding that, notwithstanding the form of the documents by which it was carried out, the arrangement made in June 1888, by Alexander Christie and Mr. Buchanan, was one between the respondents and the firm, as well as between them and Peter Christie. *Ex M.P.* 

It does not admit of doubt that the advances obtained from the bank were intended to be for the use and benefit of the firm. Although the promissory notes were signed by his father as representing Peter Christie, it is clear that they were signed for the accommodation of the firm, and that, in any question between him and the firm, Peter Christie was a mere surety. In a question with the respondents he was no doubt the primary debtor, but the firm, as indorsers of the promissory notes, were also under a direct liability to the respondents, for which security might be given. And it is a material circumstance that the evidence of Alexander Christie, which has already [44] been cited, is only consistent with the view that the firm undertook to give the respondents the security of the timber. The whole course of dealing between the parties is also consistent with that view. The advances appear to have been paid over to the firm, and the warehouse receipts for the timber to have been delivered by the firm to the respondents; and it does not appear that either the money or the receipts ever passed or were intended to pass into the possession of Peter Christie.



Their Lordships also came to the same conclusion with the majority of the learned judges, that, assuming the provisions of the Bank Act to be *intra vires*, the receipts in question were such as the firm could give and the respondents could lawfully receive. The obvious effect of sect. 54, is that, for the purposes of the Bank Act, a warehouse receipt by an owner of goods who carries on, as the firm did, the trade of a saw-miller is to be as effectual as if it had been granted by his bailee, although his business may be confined to the manufacture of his own timber. That enactment plainly implies that such a receipt is to be valid not only in the hands of the bank, but in the hands of a borrower who gives it to the bank in security of a loan. Their Lordships do not think that the provisions of sect. 53, sub-sect. 2, which are somewhat obscure, can be held to cut down the plain enactments of sect. 54, especially in a case where the grantor of the receipt himself delivers it to the bank as a security for his own debt.

It seems clear that the firm, so long as they were solvent, could not have refused to make delivery of all the timber in their possession to the respondents, although the legal ownership was still with the firm. But on that assumption, and assuming also that their trustee had no higher right than the insolvents, the question remains whether a creditor having an assignment from the trustee could plead the nullity enacted by c. 125 of the Revised Statutes. Their Lordships, before dealing with these questions, thought it expedient to determine for themselves whether the provisions of the Bank Act, to which the appellant takes exception, were competently enacted.

The appellant's plea against the legislative power of the Dominion Parliament was accordingly made the subject of

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[45] further argument; and, the point being one of general importance, their Lordships had the advantage of being assisted, in the hearing and consideration of it, by the Lord Chancellor and Lord Macnaghten. The question turns upon the construction of two clauses in the British North America Act, 1867. Sect. 91 gives the Parliament of Canada power to make laws in relation to all matters not coming within the classes of subjects by the Act exclusively assigned to the legislatures of the Provinces, and also exclusive legislative authority in relation to certain enumerated subjects, the fifteenth of which is "Banking, Incorporation of Banks, and the Issue of Paper Money." Sect. 92 assigns to each Provincial Legislature the exclusive right to make laws in relation to the classes of subjects therein enumerated; and the thirteenth of the enumerated classes is "Property and Civil Rights in the Province."

Statutory regulations with respect to the form and legal effect, in Ontario, of warehouse receipts, and other negotiable documents, which pass the property of goods without delivery, unquestionably relate to property and civil rights in that Province; and the objection taken by the appellant to the provisions of the Bank Act would be unanswerable, if it could be shewn that, by the Act of 1867, the Parliament of Canada is absolutely debarred from trenching to any extent upon the matters assigned to the Provincial Legislature by sect. 92. But sect. 91 expressly declares that, "notwithstanding anything in this Act," the exclusive legislative authority of the Parliament of Canada shall extend to all matters coming within the enumerated classes; which plainly indicates that the legislation of that Parliament, so long as it strictly relates to these matters, is to be of paramount authority. To



refuse effect to the declaration would render nugatory some of the legislative powers specially assigned to the Canadian Parliament. For example, among the enumerated classes of subjects in sect. 91, are "Patents of invention and Discovery," and "Copyrights." It would be practically impossible for the Dominion Parliament to legislate upon either of these subjects, without affecting the property and civil rights of individuals in the Provinces.

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This is not the first occasion on which the legislative [46] limits laid down by sects. 91 and 92 have been considered by this Board. In *Cushing v. Dupuy* (1) their Lordships had before them the very same question of statutory construction which has been raised in this appeal. An Act relating to bankruptcy, passed by the Parliament of Canada, was objected to as being ultra vires, in so far as it interfered with property and civil rights in the Province; but, inasmuch as "bankruptcy and insolvency" form one of the classes of matters enumerated in sect. 91, their Lordships upheld the validity of the statute. In delivering the judgment of the Board, Sir Montague Smith pointed out that it would be impossible to advance a step in the construction of a scheme for the administration of insolvent estates, without interfering with and modifying some of the ordinary rights of property.

— The law being so far settled by precedent, it only remains for consideration whether warehouse receipts, taken in security by a bank, in the course of the business of banking, are matters coming within the class of subjects described in sect. 91, sub-sect. 15, as "banking, incorporation of banks, and the issue of paper money." If they are, the provisions made by the Bank Act with respect

(1) 5 App. Cas. 409; ante, vol. 1, p. 252.



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to such receipts are *intra vires*. Upon that point, their Lordships do not entertain any doubt. The legislative authority conferred by these words is not confined to the mere constitution of corporate bodies with the privilege of carrying on the business of bankers. It extends to the issue of paper currency, which necessarily means the creation of a species of personal property carrying with it rights and privileges which the law of the Province does not, and cannot ~~attach~~ to it. It also comprehends "banking," an expression which is wide enough to embrace every transaction coming within the legitimate business of a banker.

— The appellant's counsel hardly ventured to dispute that the lending of money on the security of goods, or of documents representing the property of goods, was a proper banking transaction. Their chief contention was that, whilst the legislature of Canada had power to deprive its own creature, the bank, of privileges enjoyed by other lenders under the provincial law, it had no power to confer upon the bank any privilege as a lender, [47] which the provincial law does not recognise. It might enact that a security, valid in the case of another lender, should be invalid in the hands of the bank; but could not enact that a security should be available to the bank, which would not have been effectual in the hands of another lender. It was said, in support of the argument, that the first of these things did, and the second did not, constitute an interference with property and civil rights in the Province. It is not easy to follow the distinction thus suggested. There must be two parties to a transaction of loan; and, if a security, valid according to provincial law, was made invalid in the hands of the lender by a Dominion statute, the civil rights of the borrower would

be affected, because he could not avail himself of his property in his dealings with a bank.

But the argument, even if well founded, can afford no test of the legislative powers of the Parliament of Canada.

These depend upon sect. 91, and the power to legislate conferred by that clause may be fully exercised, although with the effect of modifying civil rights in the Province.

And it appears to their Lordships that the plenary authority given to the Parliament of Canada by sect. 91, subsect. 15, to legislate in relation to banking transactions, is sufficient to sustain the provisions of the Bank Act which the appellant impugns.

On these grounds, their Lordships have come to the conclusion that the judgments appealed from ought to be affirmed, and they will humbly advise Her Majesty to that effect. The appellant must bear the costs of this appeal.

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## PRIVY COUNCIL.

J. C.\* THE ATTORNEY-GENERAL OF ONTARIO . . . *Plaintiff* ;

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AND

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THE ATTORNEY-GENERAL FOR THE DOMINION OF CANADA

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*Defendant.*

Feb. 24.

*On Appeal from the Court of Appeal for Ontario.*

[*Reported* [1894] A. C. 189.]

*British North America Act, 1867, ss. 91, 92—Powers of Local Legislation—Enactment ancillary to Bankruptcy Law—Revised Statutes of Ontario, c. 124, s. 9.*

*Held*, that the provisions of sect. 9 of Ontario “Act respecting assignments and preferences by insolvent persons” (Revised Statutes of Ontario, c. 124), which relate to assignments purely voluntary, and postpone thereto judgments and executions not completely executed by payment, are merely ancillary to bankruptcy law, and as such are within the competence of the Provincial Legislature so long as they do not conflict with any existing bankruptcy legislation of the Dominion Parliament.

APPEAL from a judgment of the Court of Appeal (May 9th 1893) upon a question referred to them by the Lieutenant-Governor of Ontario under Ontario Act (53 Vict. c. 13), “as to the jurisdiction of the Legislature of Ontario to enact sect. 9 of the Revised Statutes of Ontario, 1887, c. 124, entitled ‘An Act respecting Assignments and Preferences by Insolvent Persons.’”

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\* *Present*:—THE LORD CHANCELLOR, LORD WATSON, LORD MACNAGHTEN, LORD SHAND, and SIR RICHARD COUCH



The Court, composed of Hagarty, C. J., Burton, Osler, [190] Maclellan, J. A., answered by a majority that the section was not within the powers of the provincial legislature.

The case is reported in 20 Ontario Appeals, p. 489, (1). Sect. 9 is set out in the judgment of their Lordships.

*Edward Blake*, Q.C. (Canadian bar), *Haldane*, Q.C., and *Bray* for the appellant:—

The effect of sect. 9 is merely to prevent a first execution creditor from securing a preference over other creditors; that is, it takes away or modifies the privileges of execution creditors. It is contended, and not seriously disputed, that to do so is within the competence of the provincial legislature as being within more than one of the enumerations in sect. 92 of the British North America Act, 1867, viz., “property and civil rights” “administration of justice” “procedure in civil cases,” and “local and private matters.” The question is whether sect. 91, under the head of “bankruptcy and insolvency,” effects a withdrawal of the subject of this clause from the provincial legislature. The presumption, at all events, is in favour of the validity of the impugned Act: see *Valin v. Langlois* (2). With regard to the withdrawal of provincial legislative authority by sect. 91, art. 21, it was contended, first, that the clause did not necessarily fall within the meaning of bankruptcy and insolvency; second, that until the Dominion Parliament has actually legislated on that subject, the powers of the provincial legislature as exercised in this case, are not affected by the existence of general powers in the Dominion Parliament which that parliament has not thought fit to exercise. In other words, the Dominion Parliament might have authority to

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(1) *Post*, p. 282.

(2) 5 App. Cas. 115; *ante*, vol. 1, p. 158.

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override the legislation of the Province; but until it does so the latter stands good as being within its powers.

Before 1867 the legislation on the subject of this Ontario Act was contained in an Act of the late Province of Canada, 22 Vict. c. 96 (see especially sects. 18, 19 and 21), and in the Consolidated Statutes of Upper Canada of 1859, c. 26 (see sect. 18.) The Dominion Parliament has not altered that legislation. It passed an Act respecting insolvency in 1875 (see 38 Vict. c. 16), and repealed it [191] in 1880 (see 43 Vict. c. 1); and since 1880 there has been no Dominion legislation on the subject of bankruptcy, or on the subject of the impugned clause 9 of the Ontario Act. The provincial legislature, on the other hand, has dealt with this subject; see Revised Statutes of Ontario, 1877, c. 118, "An Act respecting fraudulent preference of creditors by persons in insolvent circumstances," sect. 2 of which re-enacted sect. 18 of Consolidated Statutes, c. 26, which itself was a re-enactment of sect. 19 of 22 Vict. c. 96. (Reference was also made to Ontario Act, 47 Vict. c. 10, s. 3; 48 Vict. c. 26, preamble, amended by 49 Vict. c. 25, and by 50 Vict. c. 19.) Then came the Act in question in this case, c. 124 of the Revised Statutes of 1887, which re-enacted 48 Vict. c. 26, with its amendments. In its turn the Act of 1887 has been amended four times, but sect. 9 has remained untouched.

It was accordingly contended that the earlier sections of the impugned Act were merely re-enactments without change of principle of the original legislation of the Province of Canada; that the remaining sections including sect. 9, relate to such procedure as is necessary to carry out the first object of a voluntary assignment, viz., to ensure amongst creditors a fair distribution of assets without undue preference. The clauses do not apply to

insolvent persons only; they do not compel an insolvent to make an assignment. They do not enable a debtor to obtain a discharge from the obligation of any contract or from any liability. It was contended that strictly speaking, they were not bankruptcy or insolvency provisions within the meaning of art. 21 of sect. 91. They are confined to prescribing procedure and the legal resulting consequences of an assignment if made. The action of the debtor is left optional and voluntary so that the coercive legislation of bankruptcy is avoided.

Ontario Act, 43 Vict., c. 10, first abolished priority amongst execution creditors, and established a procedure whereby the sheriff held for the benefit of creditors claiming within a prescribed period rateably. That Act has never been disputed, and in the absence of Dominion legislation on the same subject, cannot be disputed. The present Act merely carries out the same principle.

[192] With regard to judicial decision, there has been no case in which the validity of sect. 9 has been considered apart from the whole Act. The Act of 48 Vict., c. 26, of which the Act impugned in this case is a re-enactment, has been several times questioned, with the result that the Courts of First Instance have decided in favour of its validity, and the Court of Appeal, being equally divided, has not reversed their decision: see *Broddy v. Stuart* (1); *Clarkson v. Ontario Bank* (2); *Edgar v. Central Bank of Canada* (3); *Kennedy v. Freeman* (4); *Hunter v. Drummond* (5); *Union Bank v. Neville* (6); *Reg. v. County of Wellington* (7).

(1) Canadian Law Times, vol. 7,  
p. 6.

(2) 15 App. Rep. 166; *ante*, vol.  
4, p. 499.

(3) 15 App. Rep. 193; *ante*, vol.  
4, p. 531.

(4) 15 App. Rep. 216.

(5) 15 App. Rep. 232.

(6) 21 Ont. Rep. 152.

(7) 17 Ont. Rep. 615; 17 App.  
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The decision appealed from was founded on a judgment of the Supreme Court in *Quirt v. The Queen* (1). It was contended that that case was distinguishable, and that the Court below was wrong in considering itself bound by it.

The Privy Council decisions cited were: *Bank of Toronto v. Lambe* (2); *L'Union St. Jacques de Montreal v. Belisle* (3); *Cushing v. Dupuy* (4); *Citizens' Insurance Company v. Parsons* (5); *Russell v. The Queen* (6); *Reg. v. Hodge* (7). These decisions and *Valin v. Langlois* (8), establish five rules of construction relating to the Act of 1867—(1.) the presumption is in favour of the validity of an enactment; (2.) the enactment should be so construed as to bring it within the legislative authority: see *Macleod v. Attorney-General for New South Wales* (9.); (3.) the true nature and construction of the enactment must be determined in order to ascertain the class of subject to which it really relates; (4.) it must be ascertained if the subject falls within sect. 92, and, if so, whether the Court is compelled by sect. 91 or other sections to cut down the full meaning of sect. 92 so that it shall not include the subject of the impugned Act; (5.) subjects which in one aspect fall within sect. 92 may [193] in another aspect and for another purpose fall within sect. 91. Applying these rules, it was contended that the provisions of this Act may have been ancillary to a scheme of bankruptcy, but were not of the essence of it so as to be within the exclusive power of the Dominion.

(1) 19 Can. S. C. R. 510.

(2) 12 App. Cas. 575; *ante*, vol. 4,  
p. 7.(3) L. R. 6 P. C. 31; *ante*, vol.  
1, p. 63.(4) 5 App. Cas. 409; *ante*, vol.  
1, p. 252.(5) 7 App. Cas. 96; *ante*, vol. 1,  
p. 265.(6) 7 App. Cas. 829; *ante*, vol. 2,  
p. 12.(7) 9 App. Cas. 117; *ante*, vol. 3,  
p. 144.(8) 5 App. Cas. 115; *ante*, vol.  
1, p. 158.

(9) [1891] A. C. 455.

Sir *Richard Webster*, Q.C., and *Carson*, Q.C., for the respondent:—

In considering whether sect. 9 is *ultra vires* the provincial legislature, the whole Act, c. 124, must be considered. It cannot be considered apart from those sections especially which relate to the effect of assignments for the general benefit of creditors, to the proceedings consequent upon such assignment, and to the position of an assignee thereunder. Such assignments necessarily contemplate the insolvency of the assignor; they would not be made under any other circumstances, moreover, the particular assignments contemplated by the impugned Act are the only assignments to which sect. 9 relates, and in all cases it is the sheriff of the county who is to be the assignee, unless with the consent of a majority of the creditors, clearly shewing that the consequences in view are those relating to the remedies of creditors in view of actual insolvency. It is not necessary in order to bring this Act within art. 21 of sect. 91 to shew that it contains compulsory provisions as to the disposal of an insolvent's estate. Voluntary assignments for the purpose of effecting that disposal are a necessary part of a bankruptcy system. When all the provisions are considered as a whole, it results that they, including sect. 9, relate to bankruptcy and insolvency within the meaning of sect. 91. The section impugned is in effect a part of a system of bankruptcy and insolvency which had been enacted, enforced and then repealed by the Dominion Parliament. Reference was made to an Act of 1864 of the Province of Canada (27 & 28 Vict., c. 17) and to Dominion Act, 32 & 33 Vict., c. 16, a bankruptcy Act which contained provisions for voluntary liquidation which was amended in 1875 by 38 Vict., c. 16, and further amended in 1877 and

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1878, and then repealed by 43 Vict., c. 1, which abolished the insolvency Acts theretofore in force in Canada. Thus [194] the Dominion Parliament decided deliberately to have no bankruptcy and insolvency system in the Dominion. The Province by the impugned Act has attempted to override and reverse that decision by re-enacting part of the repealed legislation, or enacting provisions precisely similar to those which the Dominion had rejected. This re-enactment in defiance of the Dominion Parliament was beyond the competence of the Ontario Legislature. (THE LORD CHANCELLOR:—This seems to be a common law assignment for the benefit of the creditors, and does not necessarily relate to bankruptcy. It may be outside the bankruptcy law.). By the law of England as it existed in 1867, and from before the reign of George IV., it was contended that such an assignment as is contemplated by the impugned Act was known as an act of bankruptcy whether made in England or abroad. In using the expression “bankruptcy and insolvency” in sect. 91 of the Act of that year, parliament must have contemplated such things as were known to the bankruptcy and insolvency system of the Imperial Parliament, not excluding such things as would be known to a bankruptcy and insolvency system existing in the Canadian Provinces. In effect sect. 9 is a part of a system of bankruptcy and insolvency, i.e., a part of a system which had been enacted by the Dominion and then abolished. What the Province has done by this Act is not, when fairly considered, ancillary to a system which the Dominion might have prescribed, but it is in substance a declaration that laws shall exist in the Province which the Dominion has decided by virtue of its exclusive authority under sect. 91 shall not so exist.



*Blake, Q.C., replied.*

The judgment of their Lordships was delivered by

THE LORD CHANCELLOR :—

This appeal is presented by the Attorney-General of Ontario against a decision of the Court of Appeal of that Province.

The decision complained of was an answer given to a question referred to that Court by the Lieutenant-Governor of the Province in pursuance of an Order in Council.

[195] The question was as follows :—

“Had the Legislature of Ontario jurisdiction to enact the 9th section of the Revised Statutes of Ontario, c. 124, and entitled ‘An Act respecting Assignments and Preferences by Insolvent Persons?’”

The majority of the Court answered this question in the negative; but one of the judges who formed the majority only concurred with his brethren because he thought the case was governed by a previous decision of the same Court; had he considered the matter *res integra* he would have decided the other way. The Court was thus equally divided in opinion.

It is not contested that the enactment, the validity of which is in question, is within the legislative powers conferred on the Provincial Legislature by sect. 92 of the British North America Act, 1867, which enables that legislature to make laws in relation to property and civil rights in the Province unless it is withdrawn from their legislative competency by the provisions of the 91st section of that Act which confers upon the Dominion Parliament the exclusive power of legislation with reference to bankruptcy and insolvency.

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The point to be determined therefore is the meaning of those words in sect. 91 of the British North America Act, 1867, and whether they render the enactment impeached ultra vires of the provincial legislature. That enactment is sect. 9 of the Revised Statutes of Ontario of 1887, c. 124, entitled "An Act respecting Assignments and Preferences by Insolvent Persons." The section is as follows:—

"An assignment for the general benefit of creditors under this Act shall take precedence of all judgments and of all executions not completely executed by payment, subject to the lien, if any, of an execution creditor for his costs, where there is but one execution in the sheriff's hands, or to the lien, if any, of the creditor for his costs, who has the first execution in the sheriff's hands."

In order to understand the effect of this enactment it is necessary to have recourse to other sections of the Act to see what is meant by the words "an assignment for the general benefit of creditors under this Act."

[196] The first section enacts that if any person in insolvent circumstances, or knowing himself to be on the eve of insolvency, voluntarily confesses judgment, or gives a warrant of attorney to confess judgment, with intent to defeat or delay his creditors, or to give any creditor a preference over his other creditors, every such confession or warrant of attorney shall be void as against the creditors of the party giving it.

The 2nd section avoids as against the other creditors any gift or assignment of goods or other property made by a person at a time when he is in insolvent circumstances, or knows that he is on the eve of insolvency, with intent to defeat, delay, or prejudice his creditors or give any of them a preference.

Then follows sect. 3, which is important:—

Its 1st sub-section provides that nothing in the preceding section shall apply to an assignment made to the sheriff of a county in which the debtor resides or carries on business, or to any assignee resident within the Province with the consent of his creditors as thereafter provided for the purpose of paying, rateably and proportionately, and without preference or priority all the creditors of the debtor their just debts.

The 2nd sub-section enacts that every assignment for the general benefit of creditors which is not void under sect. 2 but is not made to the sheriff nor to any other person with the prescribed consent of the creditors shall be void as against a subsequent assignment which is in conformity with the Act, and shall be subject in other respects to the provisions of the Act, until and unless a subsequent assignment is executed in accordance therewith.

The 5th sub-section states the nature of the consent of the creditors which is requisite for assignment in the first instance to some person other than the sheriff.

These are the only sections to which it is necessary to refer in order to explain the meaning of sect. 9.

Before discussing the effect of the enactments to which attention has been called, it will be convenient to glance at the course of legislation in relation to this and cognate matters both in the Province and in the Dominion. The enactments of the 1st and 2nd sections of the Act of [197] 1887 are to be found in substance in sects. 18 and 19 of the Act of the Province of Canada passed in 1858 for the better prevention of fraud. There is a proviso to the latter section which excepts from its operation any

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assignment made for the purpose of paying all the creditors of the debtor rateably without preference. These provisions were repeated in the Revised Statutes of Ontario, 1877, c. 118. A slight amendment was made by the Act of 1884, and it was as thus amended that they were re-enacted in 1887. At the time when the statute of 1858 was passed there was no bankruptcy law in force in the Province of Canada. In the year 1864 an Act respecting insolvency was enacted. It applied in Lower Canada to traders only; in Upper Canada to all persons whether traders or non-traders. It provided that a debtor should be deemed insolvent and his estate should become subject to compulsory liquidation if he committed certain acts similar to those which had for a long period been made acts of bankruptcy in this country. Among these acts were the assignment or the procuring of his property to be seized in execution with intent to defeat or delay his creditors, and also a general assignment of his property for the benefit of his creditors otherwise than in manner provided by the statute. A person who was unable to meet his engagements might avoid compulsory liquidation by making an assignment of his estate in the manner provided by that Act; but unless he made such an assignment within the time limited the liquidation became compulsory.

This Act was in operation at the time when the British North America Act came into force.

In 1869 the Dominion Parliament passed an Insolvency Act which proceeded on much the same lines as the provincial Act of 1864, but applied to traders only. This Act was repealed by a new Insolvency Act of 1875 which, after being twice amended, was, together with the amending Acts, repealed in 1880.

In 1887, the same year in which the Act under consideration was passed, the Provincial Legislature abolished priority amongst creditors by an execution in the High Court and County Courts, and provided for the distribution of any moneys levied on an execution rateably amongst all execution creditors, and all other creditors who within a month delivered to the [198] sheriff writs and certificates obtained in the manner provided for by that Act.

Their Lordships proceed now to consider the nature of the enactment said to be *ultra vires*. It postpones judgments and executions not completely executed by payment to an assignment for the benefit of creditors under the Act. Now there can be no doubt that the effect to be given to judgments and executions and the manner and extent to which they may be made available for the recovery of debts are *prima facie* within the legislative powers of the Provincial Parliament. Executions are a part of the machinery by which debts are recovered, and are subject to regulation by that parliament. A creditor has no inherent right to have his debt satisfied by means of a levy by the sheriff, or to any priority in respect of such levy. The execution is a mere creature of the law which may determine and regulate the rights to which it gives rise. The Act of 1887 which abolished priority as amongst execution creditors provided a simple means by which every creditor might obtain a share in the distribution of moneys levied under an execution by any particular creditor. The other Act of the same year, containing the section which is impeached, goes a step further and gives to all creditors under an assignment for their general benefit a right to a rateable share of the assets

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of the debtor, including those which have been seized in execution.

But it is argued that inasmuch as this assignment contemplates the insolvency of the debtor, and would only be made if he were insolvent, such a provision purports to deal with insolvency and therefore is a matter exclusively within the jurisdiction of the Dominion Parliament. Now it is to be observed that an assignment for the general benefit of creditors has long been known to the jurisprudence of this country and also of Canada, and has its force and effect at common law quite independently of any system of bankruptcy or insolvency, or any legislation relating thereto. So far from being regarded as an essential part of the bankruptcy law, such an assignment was made an act of bankruptcy on which an adjudication might be founded, and by the law of the Province of Canada which prevailed at the time when the [199] Dominion Act was passed, it was one of the grounds for an adjudication of insolvency.

It is to be observed that the word "bankruptcy" was apparently not used in Canadian legislation, but the insolvency law of the Province of Canada was precisely analogous to what was known in England as the bankruptcy law.

Moreover the operation of an assignment for the benefit of creditors was precisely the same, whether the assignor was or was not in fact insolvent. It was open to any debtor who might deem his solvency doubtful, and who desired in that case that his creditors should be equitably dealt with, to make an assignment for their benefit. The validity of the assignment and its effect would in no way depend on the insolvency of the

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assignor, and their Lordships think it clear that the 9th section would equally apply whether the assignor was or was not insolvent. Stress was laid on the fact that the enactment relates only to an assignment under the Act containing the section, and that the Act prescribes that the sheriff of the county is to be the assignee unless a majority of the creditors consent to some other assignee being named. This does not appear to their Lordships to be material. If the enactment would have been *intra vires*, supposing sect. 9 had applied to all assignments without these restrictions, it seems difficult to contend that it became *ultra vires* by reason of them. Moreover, it is to be observed that by sub-sect. 2 of sect. 3, assignments for the benefit of creditors not made to the sheriff or to other persons with the prescribed consent, although they are rendered void as against assignments so made, are nevertheless, unless and until so avoided, to be "subject in other respects to the provisions" of the Act.

At the time when the British North America Act was passed bankruptcy and insolvency legislation existed, and was based on very similar provisions both in Great Britain and the Province of Canada. Attention has already been drawn to the Canadian Act.

The English Act then in force was that of 1861. That Act applied to traders and non-traders alike. Prior to that date the operation of the Bankruptcy Acts had been confined to traders. The statutes relating to insolvent debtors, other than traders, had been [200] designed to provide for their release from custody on their making an assignment of the whole of their estate for the benefit of their creditors.

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It is not necessary to refer in detail to the provisions of the Act of 1861. It is enough to say that it provided for a legal adjudication in bankruptcy with the consequence that the bankrupt was divested of all his property and its distribution amongst his creditors was provided for.

It is not necessary in their Lordships' opinion, nor would it be expedient to attempt to define what is covered by the words "bankruptcy" and "insolvency" in sect. 91 of the British North America Act. But it will be seen that it is a feature common to all the systems of bankruptcy and insolvency to which reference has been made, that the enactments are designed to secure that in the case of an insolvent person his assets shall be rateably distributed amongst his creditors whether he is willing that they shall be so distributed or not. Although provision may be made for a voluntary assignment as an alternative, it is only as an alternative. In reply to a question put by their Lordships the learned counsel for the respondent were unable to point to any scheme of bankruptcy or insolvency legislation which did not involve some power of compulsion by process of law to secure to the creditors the distribution amongst them of the insolvent debtor's estate.

In their Lordships' opinion these considerations must be borne in mind when interpreting the words "bankruptcy" and "insolvency" in the British North America Act. It appears to their Lordships that such provisions as are found in the enactment in question, relating as they do to assignments purely voluntary, do not infringe on the exclusive legislative power conferred upon the Dominion Parliament. They would observe that a system of bankruptcy legislation may frequently

require various ancillary provisions for the purpose of preventing the scheme of the Act from being defeated. It may be necessary for this purpose to deal with the effect of executions and other matters which would otherwise be within the legislative competence of the Provincial Legislature. Their Lordships do not doubt that it would be open to the Dominion Parliament to deal with such matters as part of a bankruptcy [201] law, and the Provincial Legislature would doubtless be then precluded from interfering with this legislation inasmuch as such interference would affect the bankruptcy law of the Dominion Parliament. But it does not follow that such subjects, as might properly be treated as ancillary to such a law and therefore within the powers of the Dominion Parliament, are excluded from the legislative authority of the Provincial Legislature when there is no bankruptcy or insolvency legislation of the Dominion Parliament in existence.

Their Lordships will therefore humbly advise Her Majesty that the decision of the Court of Appeal ought to be reversed, and that the question ought to be answered in the affirmative. The parties will bear their own costs of this appeal.

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Nearly five years ago this Court had before it the case of *Clarkson v. Ontario Bank* (1) and three others in which, after very full consideration, the constitutionality of this Assignments Act was considered.

I then gave my views against the validity of the Act (except as to sects. 1 and 2) at considerable length and certainly after the most searching enquiry which I am capable of exercising.

I have carefully re-examined those opinions and can see no reason to alter the conclusion then arrived at.

The section 9 on which our opinion is now sought cannot, as I think, be separated from the rest of the statute.

It provides that an assignment under the Act shall take precedence of all judgments and executions not completely executed by payment.

I believe that this section was relied on and considered as one of the chief arguments against the Act as shewing the most marked evidence of the creation of a new system for the administration of insolvent estates, interfering with the ordinary laws as regards debtor and creditor and as trenching on the subject of bankruptcy and insolvency.

I find it impossible to separate it from the rest of the Act or to give any opinion as to its effect standing by itself unless I arrived at a judgment the opposite to that expressed in 1888, to which I still fully adhere.

The opinions of the Judges of the Supreme Court in *Quirt v. The Queen* (2), seem to support the view that legislation of [494] the nature of that now before us, affecting the distribution of insolvent estates, is appropriated by the Federation Act to the Dominion Parliament.

(1) 15 App. Rep. 166 ; *ante*, vol. 4,  
p. 499.

(2) 19 Can. S. C. R. 510.

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This last case was before us under the name of *Regina v. County of Wellington* (1). I adhere to the opinion there expressed by me.

I must answer the question submitted to this Court in the negative.

BURTON, J. A.:—

I can add but little to what I said in *Edgar v. Central Bank* (2). The Parliament of Canada having power to pass laws for the good government of the Dominion were entrusted with the exclusive power of passing laws on the subject of bankruptcy and insolvency, and the question is whether this section falls within those terms.

Their meaning is, I think, well expressed by Lord Selborne thus: "The words describe in their well-known legal sense provisions made by law for the administration of the estates of persons who may become bankrupt or insolvent, according to rules and definitions prescribed by law, including of course the conditions in which that law is to be brought into operation, the manner in which it is to be brought into operation, and the effect of its operation" (3).

In other words, bankruptcy and insolvency were well-known legal terms not confined to the state of things in England or the Provinces at the time of the passing of the confederation Act, but applicable to systems of legislation with which the whole civilized world were presumed to be familiar.

The Dominion Parliament and that Parliament alone can determine whether the legal relation of bankrupt or insolvent shall be created out of any given combination of facts or circumstances, but there would seem to be a difference of opinion as to the true meaning to be attributed to the language of Lord Selborne. It appears to be thought by some that he was not dealing with the well-known legal sense of the terms "bankrupt or insolvent," but that the words had relation to all persons unable to pay their debts in full, and in that sense therefore insolvent, and not to persons declared by competent authority to be bankrupt or insolvent.

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(1) 17 App. Rep. 421.

(2) 15 App. Rep. 193; *ante*, vol. 4, p. 531.

(3) *L'Union St. Jacques v. Belisle*, L. R., 6 P. C. p. 36; *ante*, vol 1, p. 70.

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“What business man,” said one of the counsel who was contending that this Act was *ultra vires*, “could suppose for a moment on reading the title to this Act (R. S. O. c. 124) or the language of the first section, that it was not insolvency legislation?” But with great respect that is not the test. A business man not versed in legal terms would very likely so understand the enactment, but the question is, what is the true construction of the words used by the Imperial Legislature when dealing with the distribution of legislative powers, and when we find these powers included with other classes of subjects of national and general concern, such as trade and commerce, and find also that power is given in the same general terms to deal with property and civil rights to the legislatures of the Provinces, we are driven to inquire how far those general words are qualified by anything appearing in sect. 91. If the meaning of the words in question is not such, as I suppose—a power to declare who shall be bankrupt or insolvent and to legislate in reference to them—it would follow that Parliament could deal with persons unable to pay their debts in each Province, and the powers of the Province in respect to any such matters would be gone. That, I venture to think, was never intended, but the words must receive a more limited construction and probably be treated in the same way as the words “regulation of trade and commerce” have come to be construed, as confined to matters of national or general concern affecting the whole Dominion.

The statute, the section of which we are considering, with the exception of the provisions against preferences, was on our [496] statute book since 1858, and for a long period when we had a Bankrupt or Insolvent Act; but it was always construed like the Statute of Elizabeth, and never treated as an Insolvent Act nor was a person availing himself of its provisions ever spoken of as an insolvent, although he was in a state of insolvency in the sense that he was unable to meet his liabilities.

That it would extend to all persons unable to meet their liabilities is evidently the view entertained by the late Chief Justice of the Supreme Court in *Regina v. Chandler* (1). That case was decided shortly after confederation and would scarcely be so decided at the present day.

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(1) 1 Hannay 556; *ante*, vol. 2, p. 421.



The matters dealt with by the statute come clearly within the definition of property and civil rights, and the onus is therefore upon those who attack it to shew its invalidity. I find it very difficult to understand upon what ground local legislation making provision for the distribution of a man's estate among his creditors and even for his discharge can be impugned as being beyond local jurisdiction.

In the case of *Edgar v. Central Bank*(1) I went in detail over several of the other sections of the Act, but abstained from expressing any opinion upon this particular section as it was unnecessary then to do so, but the same reasons which I thought then sufficient for upholding the validity of those sections apply, I think, equally to it and I should therefore, if at liberty to express my own opinion, answer the question submitted in the affirmative, but a decision of the Supreme Court, by which I am bound, appears to me, as I understand it, to prevent my doing so.

In that case, *Quirt v. The Queen* (2), a bank professing to be possessed of assets exceeding its liabilities executed a deed of arrangement for the benefit of its creditors with a resulting trust to the shareholders of the bank.

[497] This was previous to confederation. Subsequently the Dominion Parliament incorporated the trustees and professed to confer upon them additional powers to those given to them by the deed of assignment and professed to ratify the deed.

Subsequently, and after the bank's charter had expired, the Dominion Parliament passed an Act to transfer the assets so assigned from the trustees to the Crown.

The assignment was one which if it offended against any of the provisions of our provincial assignment Act, if, for instance, it had given a preference to one creditor or one class of creditors over another, might have been avoided.

I express no opinion as to whether the powers of the Dominion Parliament in reference to bankruptcy and insolvency are confined to a general bankrupt or insolvent Act, or whether they could pass a special Act for the winding up of the affairs of some particular company, it is sufficient to say that that was not the legislation which took place in the case of this bank. Conceding for the moment that they might in a private Act have declared this bank insolvent according to the definition which I have placed upon it, they did not do so; on the contrary they recognised the assignment which,

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as I have pointed out, would have been void as against creditors if it offended against the provincial Act.

The fact that this assignment was made by a bank cannot, in my opinion, affect the question. If the Dominion Parliament could deal with it they could equally deal with an assignment by any commercial firm whom by a parity of reasoning they could by special enactment have declared bankrupt or insolvent.

I do not at all doubt the power of the Dominion, in a case coming within their legislative powers as to bankruptcy and insolvency, to make a statutory conveyance of the bankrupt's estate, but the foundation here was wanting. They were not dealing with a bankrupt's estate. They were dealing with an assignment with which [498] alone, in my judgment, the Provincial Legislature had power to legislate.

I respectfully differ from the learned judges who placed some reliance on the fact that the views of the Provincial Legislature at its first session seemed to recognise the Dominion legislation; that, I submit, cannot affect the construction of the British North America Act.

As I understand that judgment, if an assignment had been made by an individual or a commercial firm whom by special legislation the Dominion Parliament could declare insolvent, but who had not been declared insolvent, they could validate an assignment made by him or them, although it was void under our Preference Act. I think myself that the Local Legislature could alone validate such an assignment.

The Supreme Court places its judgment on the effect of the language "bankruptcy and insolvency" in the British North America Act. The bank here never was declared bankrupt or insolvent and could not be so declared except by an Act of the Dominion Parliament. The conclusion, therefore, is irresistible that the Supreme Court has decided that a person insolvent within the meaning of R. S. O. c. 124, or in insolvent circumstances and making an assignment is brought within this definition of insolvency within the British North America Act.

If that be so the Act must be beyond the jurisdiction of the Province and the power to deal with such an assignment must be exclusively vested in the Dominion, and that view must, I apprehend, now be regarded as the law of the land, and so I am constrained to answer the question in the negative.

If this is insolvency legislation, as the Supreme Court seems to hold, the whole enactment would seem to be *ultra vires*.



OSLER, J. A.:—

Said that for reasons given by him on a former occasion he did not feel called on to answer a question submitted in this way.

MACLENNAN, J. A.:—

[499] The question we are asked to decide is whether the Legislature of Ontario had authority to enact sect. 9 of R. S. O. c. 124.

It was enacted originally on the 30th March, 1885, as a section of an Act, 48 Vict. c. 26, entitled "An Act respecting Assignments for the benefit of Creditors." Several amendments have been made to this Act since it was first enacted, and sect. 9 has also been amended, but the amendment has not affected the question of its validity. Neither at the time the section was first enacted nor at any time since has there been any bankruptcy or insolvency law of the Dominion in force except the Winding-up Act, which applies only to banks and other incorporated companies, and perhaps some special Acts for settling the affairs of companies, such as the Acts relating to the affairs of the Bank of Upper Canada.

The Insolvent Acts which had been in force in the Province continuously from the time of confederation until the year 1880 had been repealed on the 1st of April in that year by the Act 43 Vict. c. 1 (D), entitled "An Act to repeal the Acts respecting Insolvency now in force in Canada," and the Winding-up Act was passed in 1882.

In March, 1888, the constitutional validity of the provincial statute was raised in four cases in this Court, namely *Clarkson v. Ontario Bank*, *Edgar v. Central Bank*, and two others, all reported together in 15 A. R. 166 (1), and the Court was equally divided on the question. The learned Chief Justice and Mr. Justice Osler were of opinion that the whole Act, except the first two sections, was invalid, and Mr. Justice Patterson and my brother Burton were of a contrary opinion. The last named judges, however, reserved from their judgment the section now in question, and expressed no opinion upon it.

After the best consideration which I have been able to give to the question I have arrived at the opinion that the section is valid. [500] I adopt the reasoning in the cases referred to, of Mr. Justice Patterson and my brother Burton, and also of the late Master Dalton in *Union Bank v. Neville* (2).

The question depends on the sense in which the words "bankruptcy and insolvency" are used in the British North America Act,

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sect. 91. In *Regina v County of Wellington* (1), I said I thought. that the power of legislation over bankruptcy and insolvency which was intended to be conferred on the Dominion Parliament was the same as had been exercised by the Imperial Parliament and by the Provincial Legislatures before confederation, namely, the passing of laws more or less general in their application, with proper courts and procedure and machinery for carrying them into effect, and not Acts declaring a particular person or firm or corporation bankrupt or insolvent, or putting their affairs into a course of liquidation. Upon appeal from our judgment in that case, however, it was held unanimously that this was an erroneous view of the statute, and that an Act for the settlement of the affairs of a particular insolvent bank, the late Bank of Upper Canada, was within the powers of Parliament as bankruptcy and insolvency legislation: *Quirt v. The Queen* (2). It is therefore now decided that Parliament may not only pass a general law of bankruptcy and insolvency, but may deal with particular cases; and it seems to follow that it might pass an Act for settling the affairs of a single firm or individual, being indebted.

I think, however, it does not follow from that decision that the enactment in question in this appeal is invalid, as an invasion of the exclusive legislative domain of Parliament. It merely declares that assignments for creditors shall take precedence of all judgments and executions not completely executed by payment. I confess I am altogether at a loss to understand why this should be regarded as bankruptcy or insolvency legislation. The assignment which is spoken of is a purely voluntary act. It is an act which is optional with the debtor; and being made, the statute (sect. 4) gives it the effect of passing the whole of his property by the [501] mere use of a certain form or words. In this respect sect. 4 is analogous, as was pointed out by Mr. Justice Patterson in *Edgar v. The Central Bank* (3), to conveyances, leases and mortgages made under the Acts respecting short forms of those kinds of instruments. This short form of assignment did not give the debtor any new power, but only enabled him to do by the use of a short instrument what he could have done by a longer one. Now the effect of the assignment, without the aid of sect. 9, now under consideration, is to vest in the assignee property under seizure by the sheriff, as well as all other property of the debtor, subject only to the lien of the execution, and all that the section in question does is to displace that lien and to put the execution creditor on a

(1) 17 App. Rep. 421.

(2) 19 Can. S. C. R. 510.

(3) 15 App. Rep. 166, 210; *ante*, vol.

4, pp. 499, 551.

par with the other creditors. In effect it says that an execution shall not be a lien on property seized as against an assignment for creditors, until it is actually sold thereunder.

When the Act says that the assignment is to take precedence of executions, it does not mean that the execution creditor is to be postponed to other creditors, but only that executions must give way to the assignment, and that the execution creditor must take his proportionate share of the estate with other creditors. It is merely a change of the law of the Province as to executions. Formerly executions had priority in the order of their delivery to the sheriff or other officer for execution. That order of priority has been done away with by the Creditors' Relief Act, R. S. O. c. 65, passed in 1880, and I understand that my learned brothers do not doubt the power of the Legislature to make that change. The section in question further changes and qualifies the effect of an execution. It is now liable to be superseded by an assignment made at any time before a sale. If the Legislature can abolish priority between executions, so that a later execution creditor is put on an equality with an earlier one, why can it not abolish priority between an execution creditor and creditors who have no executions, so that the latter shall stand on an equality with the former? If the one is not bankruptcy and insolvency legis- [502] lation, I am unable to see why the other should be so regarded. It is merely the effect and operation of an execution which has been altered by legislation in each case.

But I incline to the opinion that except so far as the Dominion chooses from time to time to occupy the field of bankruptcy and insolvency legislation, the Province may occupy it. I think that follows from the manner in which their respective powers are defined by sects. 91 and 92 of the British North America Act. In *Citizens' Insurance Co. v. Parsons* (1) it was decided by the Judicial Committee that the phrase "property and civil rights in the Province" employed in No. 13, sect. 92, included rights arising out of contract, and therefore those words embrace the whole law of debtor and creditor. What the Act does then is to give the whole field of property and civil rights to the Province, and then to give to the Dominion that part of it which answers to the description of bankruptcy and insolvency. Bankruptcy and insolvency are excepted or subtracted from the general field of property and civil rights. Now, if bankruptcy and insolvency was susceptible of clear definition apart from legislation, like bills of exchange and

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(1) 7 App. Cas. 96, 110; ante, vol. 1, pp. 265, 275.



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promissory notes, patents of invention, copyright, and the like, there would be no difficulty in saying with reference to any particular act of legislation that it was or was not within the exception, and so that it was or was not within the power of the Province. But apart from legislation it is not definable. Apart from legislation there is no such thing as bankruptcy or insolvency. Parliament may pass Acts of that character, and when it does the subject is defined, and we can see what it is. Whatever part of the field of property and civil rights it occupies for that purpose is taken away from the Province, but no more. So far as any such Act extends the law of the Province must yield and is overborne, but beyond that it is the power and duty of the Province to care for the public interest and to enact and enforce proper laws in relation to property and civil rights. Bankrupt and insolvent laws [503] are not a necessity, are not an essential part of every system of jurisprudence or of government. There may or may not be such laws. If Parliament thinks fit to have such laws it has the exclusive power to enact them; but it is not obligatory, and if there be no such law it is still necessary that there be some law of debtor and creditor, and that subject is expressly given to the Province.

There was no such thing as bankruptcy or insolvency at the common law. There was no distinction between the fraudulent or insolvent debtor and any other debtor, who did not pay his creditors. There was the same remedy against all by action, judgment and execution, and all debtors alike were held bound until full payment. Bankruptcy and insolvency therefore are wholly the creatures of legislation, and without legislation they do not and cannot exist.

The impossibility of defining bankruptcy in the abstract, and apart from legislation, is apparent from the history of the subject. The first bankrupt Act in England was the Act 34 & 35 H. VIII, c. 4, in the year 1542; and between that time and the passing of the Act 24 & 25 Vict. c. 134, which was in force when the British North America Act was passed, a very large number of such Acts was passed changing the character of the legislation from time to time. The Acts which were passed prior to 1823 will be found printed in extenso in the 1st volume of the 8th edition of Cook's Bankrupt Laws (1823), and an examination of them will shew how the definition of the subject changed from time to time with the legislation. That change is shewn strikingly by a comparison between the Act of H. VIII and the Act of 24 & 25 Vict. in 1861. The Act of H. VIII makes no reference whatever to inability to pay or insufficiency of assets. It is directed against fraudulent debtors only.



Bankrupts are described as “persons who, craftily obtaining into their hands great substance of other men’s goods, do suddenly flee to parts unknown or keep their houses not minding to pay or restore to any of their creditors, their debts and duties, [504] but at their own wills and pleasures consuming the substance obtained by credit of other men for their own pleasure and delicate living, against all reason, equity and good conscience.” The Lord Chancellor and other high officers are authorized to seize and distribute the estates of such debtors among their creditors, and it is provided that if the creditors be not satisfied by these means, they may still recover the residue by ordinary process as before the Act. That continued to be the law of bankruptcy for a long time, and the changes which were made afterwards were made gradually, until by the law of 1861 all persons whether traders or non-traders, whether honest or dishonest, whether they were or were not possessed of sufficient property to pay their debts in full, were made subject to the law in case they had committed certain defined acts or defaults. These acts and defaults are enumerated at p. 127 of 1 Doria & MacRae’s Law of Bankruptcy (1863), and some of them are the following: non-payment after judgment debtor summons by either trader or non-trader; suffering execution to be levied on any of his goods and chattels for any debt exceeding £50, by a trader; and non-payment within seven days by a trader, and within two months by a non-trader, after decree or order peremptory in equity, bankruptcy or lunacy. Prior to the Act of 1861 and as far back as the 13th Elizabeth the law was confined to traders; as to all other persons there was no such law.

The history of the subject in this country shews the same variety in bankruptcy legislation. In the Provinces of Ontario and Quebec there had been a bankruptcy Act in force more or less from 1843 to 1856, when it expired, after which there was none until 1864. The Act of that year was called “The Insolvent Act of 1864,” and although called an insolvent Act it was in reality a bankruptcy Act; and it was made applicable in Lower Canada to traders only, but in Upper Canada to all persons whether traders or not. This is the Act which was in force in Ontario and Quebec when the British North America Act was passed, and while it was undoubtedly in its nature a bankruptcy Act, it differed in many [505] respects from the English Act. I do not know what if any bankruptcy or insolvency laws existed at that time in any of the other Provinces of the Dominion.

The Act of 1864 was repealed in 1869, and a new Act was passed extending to the whole Dominion, called “The Insolvent Act of

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1869." It was confined to traders, and any trader unable to meet his engagements might either take the benefit of it voluntarily or might, under defined circumstances, be compelled to do so. The Act of 1869 was re-enacted with considerable alterations in 1875, and was still confined to traders. This law continued in force until 1880, when it was repealed, and since that time there has been no Dominion law of bankruptcy or insolvency except as already stated the Winding-up Act which is confined to corporations, and perhaps some special Acts relating to particular cases, such as the Bank of Upper Canada Act. What I mean is that there has not been since that time, and there is not now, any general Act of the Dominion taking up or occupying any certain part or section of the law of debtor and creditor, for its operation as a law of bankruptcy and insolvency. While there was such a Dominion law, the law of the Provinces had to give way. Parliament could declare and did declare that to the extent defined in that law, the relations of debtor and creditor were to be regulated and adjusted by and under that law. Within its limits was the realm of bankruptcy and insolvency which Parliament had appropriated to itself. All without those limits which concerned the same relation, was left to the Legislature of the Province, as being a part of property and civil rights. While the Act was in force it seems clear the Province could deal with everything outside of it, and when it was repealed I think the whole field was left to the Province. I think, therefore, the true solution of the question is, that Parliament may pass laws of bankruptcy and insolvency, and may thereby define the nature and extent of its interference with the law of the Province for that purpose, can make that [506] interference more or less extensive, according to its pleasure, and that to such laws while they are in force the laws of the Provinces must give way to all intents and purposes. But unless and until Parliament do pass such laws the legislative power of the Province is not interfered with, and it is free to occupy the whole field. While the Dominion Acts are in force the field of bankruptcy and insolvency is defined. When they are repealed, definition is impossible, for the thing has ceased to exist.

When the British North America Act was passed bankruptcy was a different thing in England from what it was in Ontario, and different in Ontario from what it was in Quebec. The Act of 1864 was applicable to all persons in Ontario, while in Quebec it was confined to traders, and the Acts of 1869 and 1875 were confined to traders in all the Provinces; and I think it can hardly be doubted that the Acts were so restricted in order to leave other



debtors to the operation of the laws of their respective Provinces, as they might be modified by their respective Legislatures.

If we are to take our definition of bankruptcy and insolvency from the laws existing at the time of the passing of the British North America Act, which laws are to be our guide? Is it the Imperial Bankruptcy Act or the Insolvency Act of 1864, or the law of some other Province? If the Act of 1864, shall it be as it applied to Ontario or to Quebec? It seems impossib'le to say that any or either of these can afford a governing rule or a permanent definition of the term "bankruptcy and insolvency;" and if not, and if we must find a definition without reference to an actual statute on the subject, there would seem to be no alternative but to include everything that might be dealt with by such a law. It must be conceded that among the legitimate subjects of such a law may be included the definition and punishment of frauds by debtors upon their creditors, and the compulsory application of the estates of debtors, whether fraudulent or not, and whether actually insolvent in the sense of a deficiency of assets or not, in payment of their creditors. If that be so it seems clear that a [507] bankruptcy or insolvency law might go the length of providing that the property of every person who failed to pay a debt at maturity should ipso facto be vested in the sheriff or other public officer for the payment of all his debts, and that no action or suit should be necessary or proper for the recovery thereof. I see no reason why Parliament could not go that length. A bankruptcy law is a law for the recovery of debts, and it might thus become the only law. So also Parliament might as incident to such a law declare all transfers of property and payments made by a debtor within a defined period, whether for value or not, to be void and to be reconveyed or paid back.

The argument in the present case is that because the provision in sect. 9 is one that might reasonably be inserted in a bankruptcy or insolvency Act, the Legislature could not pass it. If that be so I think it follows that the Legislature can pass no Act whatever for the recovery of debts. A bankrupt law might do that, and therefore any law for the purpose is bankruptcy legislation and *ultra vires*. If the argument is to prevail, then the Province cannot touch the subject of the recovery of debts at all, can make no law for compulsory payment, no law of frauds upon creditors or any law of preferences, or to secure equality of distribution. The method by which debts are to be recovered must be regulated by Parliament, and inasmuch as bankruptcy and insolvency legislation may extend to and include procedure, that also is taken from the

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Province, and so far as the Judicature Act deals with actions for debts it is all *ultra vires*. I do not think that is the meaning of the words as used in the British North America Act; but that inasmuch as the field of bankruptcy and insolvency is in itself indefinite, and may be more or less extensive according to the will of Parliament, I think the true construction of the Act is that Parliament can pass such bankruptcy or insolvency legislation as it thinks fit, and that so far as it does the provincial law is overborne. But I think that until Parliament passes such a law, and outside its limits when it is passed, the jurisdiction of the Province over [508], property and civil rights is unimpaired and unaffected.

As has been stated, Parliament in 1880 repealed its law of bankruptcy and insolvency, and thereby, as I conceive, the law relating to the payment of debts was left free once more to the legislation of the Provinces, and it was in my opinion competent to the Province of Ontario to pass the enactment in question, subject to be overborne and displaced if and whenever the Dominion, in the exercise of its jurisdiction over bankruptcy and insolvency, shall think fit to make other provisions.

In my judgment, therefore, the Legislature of Ontario was competent to enact the section in question.

*MacLennan*

## PRIVY COUNCIL.

ATTORNEY-GENERAL FOR ONTARIO.....	<i>Appellant;</i>	J. C.*
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		Aug. 1, 2, 6, 7.
AND		1896
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AND THE DISTILLERS AND BREWERS' AS-		
SOCIATION OF ONTARIO....	<i>Respondents.</i>	

*On Appeal from the Supreme Court of Canada.*

[Reported [1896] A.C. 348.]

*British North America Act, ss. 91, 92—Distribution of Legislative Powers—Liquor Laws—Power of Prohibition—Canada Temperance Act, 1886—Ontario Act, (53 Vict. c. 56) s. 18.*

The general power of legislation conferred upon the Dominion Parliament by s. 91, of the British North America Act, 1867, in supplement of its therein enumerated powers, must be strictly confined to such matters as are unquestionably of national interest and importance; and must not trench on any of the subjects enumerated in s. 92, as within the scope of provincial legislation unless they have attained such dimensions as to affect the body politic of the Dominion.

Dominion enactments, when competent, override but cannot directly repeal provincial legislation. Whether they have in a particular instance effected virtual repeal by repugnancy is a question for adjudication by the tribunals, and cannot be determined by either the Dominion or provincial legislature.

Accordingly the Canada Temperance Act, 1886, so far as it purported to repeal the prohibitory clauses of the old provincial Act of 1864 (27 & 28 Vict. c. 18) was ultra vires the Dominion. Its own prohibitory provisions are, however, valid when duly brought into operation in any provincial area, as relating to the peace, order, and good government of Canada;

\**Present*:—LORD HALSBURY, L. C., LORD HERSCHELL, LORD WATSON, LORD DAVEY, and SIR RICHARD COUCH.

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*Russell v. Reg.* (7 App. Cas. 829 ; ante, vol. 2, p. 12) followed ;  
 but not as regulating trade and commerce within s. 91, sub-s.  
 2, of the Act of 1867 ;

*Citizens' Insurance Co. v. Parsons* (7 App. Cas. 96 ; ante vol. 1,  
 p. 265) distinguished and *Municipal Corporation of Toronto v. Virgo*  
 ([1896] A.C. 93), followed.

*Held*, also, that the local liquor prohibitions authorized by the  
 [349] Ontario Act (53 Vict. c. 56), s. 18, are within the powers of the  
 provincial legislature. But they are inoperative in any locality  
 which adopts the provisions of the Dominion Act of 1886.

APPEAL by special leave from a judgment of the  
 Supreme Court (Jan. 15th 1895) (1) consisting of Strong  
 C. J., Fournier, Gwynne, Sedgewick and King, JJ. Under the Supreme and Exchequer Courts Act (Revised  
 Stat. Can. c. 135), as amended by Dominion Act (54 &  
 55 Vict. c. 25), s. 4, the Governor-General of Canada, by  
 Order in Council (Oct. 26, 1893), submitted to the  
 Supreme Court of Canada the following questions :—

(1.) Has a provincial legislature jurisdiction to prohi-  
 bit the sale within the province of spirituous, fermented,  
 or other intoxicating liquors ?

(2.) Or has the legislature such jurisdiction regarding  
 such portions of the province as to which the Canada  
 Temperance Act is not in operation ?

(3.) Has a provincial legislature jurisdiction to prohi-  
 bit the manufacture of such liquors within the province ?

(4.) Has a provincial legislature jurisdiction to prohi-  
 bit the importation of such liquors into the province ?

(5.) If a provincial legislature has not jurisdiction to  
 prohibit sales of such liquors, irrespective of quantity,  
 has such legislature jurisdiction to prohibit the sale by  
 retail, according to the definition of a sale by retail either  
 in statutes in force in the province at the time of confed-  
 eration, or any other definition thereof ?

(6.) If a provincial legislature has a limited jurisdic-  
 tion only as regards the prohibition of sales, has the legis-



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lature jurisdiction to prohibit sales subject to the limits provided by the several sub-sections of the 99th section of the Canada Temperance Act, or any of them (Revised Statutes of Canada, 49 Vict. c. 106, s. 99)?

(7.) Has the Ontario Legislature jurisdiction to enact s. 18 of Ontario Act 53 Vict. c. 56, intituled "An Act to improve the Liquor License Acts" as said section is explained by Ontario Act 54 Vict. c. 46, intituled "An Act respecting local option in the matter of liquor selling"? yes

[350] Sect. 18, referred to in the last of the said questions, is as follows:—

"18. Whereas the following provision of this section was at the date of confederation in force as a part of the Consolidated Municipal Act (29th and 30th Victoria, chapter 51, section 249, sub-section 9), and was afterwards re-enacted as sub-section 7 of section 6 of 32nd Victoria, chapter 32, being the Tavern and Shop License Act of 1868, but was afterwards omitted in subsequent consolidations of the Municipal and Liquor License Acts, similar provisions as to local prohibition being contained in the Temperance Act of 1864, 27th and 28th Victoria, chapter 18; and the said last mentioned Act having been repealed in municipalities where not in force by the Canada Temperance Act, it is expedient that municipalities should have the powers by them formerly possessed: it is hereby enacted as follows:—

"The council of every township, city, town, and incorporated village may pass by-laws for prohibiting the sale by retail of spirituous, fermented, or other manufactured liquors in any tavern, inn, or other house or place of public entertainment, and for prohibiting altogether the sale thereof in shops and places other than houses of public entertainment. Provided that the by-law before the final passing thereof has been duly approved of by the electors of the municipality in the manner provided by the sections in that behalf of the Municipal Act.

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Provided further that nothing in this section contained shall be construed into an exercise of jurisdiction by the legislature of the Province of Ontario beyond the revival of provisions of law which were in force at the date of the passing of the British North America Act, and which the subsequent legislation of this province purported to repeal.”

Act 54 Vict. c. 46, referred to above, declares that s. 18 was not intended to affect the provisions of s. 252 of the Consolidated Municipal Act, being Canada Act, 29 & 30 Vict. c. 51.

A majority of the Supreme Court, after hearing counsel for the Dominion, the Provinces of Ontario, Quebec and Manitoba, and also, under section 37, sub-s. 4, of the Supreme and Exchequer Courts Act for the Distillers [351] and Brewers' Association of Ontario, answered all the questions in the negative. Strong C. J. and Fournier J., while agreeing in a negative answer to questions 3 and 4, answered the remainder in the affirmative.

The case in the Court below is reported in 24 Sup. Ct. Can. Reports, p. 170.

*Maclaren*, Q.C. (of the Colonial Bar) and *Haldane*, Q.C. for the appellant.

*Newcombe*, Q.C. (of the Colonial Bar) and *Loehnis*, for the Attorney-General for the Dominion.

*Blake*, Q.C., and *Wallace Nesbitt* (both of the Colonial Bar), for the Distillers and Brewers' Association.

*Maclaren*, Q.C., and *Haldane*, Q.C., contended that s. 18 of the Ontario Act of 1890 was authorized as relating to a subject comprised within the term “municipal institutions” in s. 92, sub-s. 8, of the British North America Act, 1867. *Citizens' Insurance Co. v. Parsons* (1) lays down the rule that provincial legislation is valid

(1) 7 App. Cas. 96; ante, vol. 1, p. 265.

if it relates to the enumerated subjects in s. 92, and is not overridden by the enumerated subjects in s. 91. It was admitted that a provincial legislature could not give to a municipality control over any of the subjects mentioned in s. 91. But a power to create municipal institutions must involve a power to give them such powers as usually belong to such bodies. In Canadian legislation, prior to the Imperial Act of 1867, municipal institutions included a large number of subjects not specifically enumerated in s. 92. The expression has acquired a well defined legislative meaning, and the term was used in s. 92 in the sense so acquired. The Act of 1867 was founded on the Quebec resolutions, and expressions which came textually therefrom should be interpreted by the light of Canadian legislation.

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(THE LORD CHANCELLOR. Then how do you define that technical meaning?)

It meant the conferring on them such powers as under Canadian legislation had been understood to belong to them except such as were assigned to the Dominion under s. 91.

(LORD HERSCHELL. Canadian legislation varied. [352] Municipal institutions had different powers in Canada from what they had in Nova Scotia and New Brunswick.)

Reference was made to *Hodge v. Reg.* (1) and *Russell v. Reg.* (2), and to a series of Canadian Statutes passed before 1867, being, as respects those relating to Upper Canada, 12 Vict. c. 81; 16 Vict. c. 184; 22 Vict. c. 99, s. 245; Cons. Stat. Upper Canada of 1859, c. 54, s. 246; 29 & 30 Vict. c. 51; and as relating to Lower Canada—16 Vict. c. 214; 18 Vict. c. 100, s. 23; 19 & 20 Vict. c. 101, ss. 8, 11; 20 Vict. c. 129, s. 37; Cons. Stat. L. C.

(1) 9 App. Cas. 117; *ante*, vol. 3, p. 144.

(2) 7 App. Cas. 829; *ante*, vol. 2, p. 12.



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1861, c. 24, s. 26, sub-ss. 10, 15, and s. 27, sub-s. 16. Reference was also made to 27 & 28 Vict. c. 18; 29 & 30 Vict. c. 32; Revised Stat. Nova Scotia, c. 75; Public Stat. of New Brunswick (1854), c. 15. The expression has also been interpreted in decided cases: See *Slavin v. Corporation of Orillia* (1); *Reg. v. Taylor* (2); *Keefe v. Maclellennan* (3); *In re Local Option Act* (4); *Corporation of Huntingdon v. Moir* (5); *Lepine v. Laurent* (6); *Huson v. S. Norwich* (7). Sub-sects. 9, 13, and 16 of s. 92 were also relied on. It was further contended that the Act in question was valid unless and until the Dominion Parliament should legislate in a manner which would override its provisions. It does not conflict with the Canada Temperance Act, 1878, for it could only apply to places where that Act has not been put into force. Reference was made to *L'Union St. Jacques de Montreal v. Belisle* (8); *Attorney-General of Ontario v. Attorney-General for Canada* (9); *Bank of Toronto v. Lambe* (10). The general result of the authorities is that the words "regulation of trade and commerce" in s. 91 mean general regulation in a broad sense; not of such specific matters as are involved in the Act in question, nor of any minute details, nor any regulation of matters of a merely local nature or private or peculiar to any particular trade.

[353] *Newcombe*, Q.C., contended that a provincial legislature has no authority to prohibit the sale, manufacture, or importation of spirituous, fermented, or other intoxicating liquors. Further that it has no authority to prohibit the sale of such liquors either by wholesale or retail, or subject to the exemptions established by the

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| (1) 36 U. C. Q. B. 159, <i>ante</i> , vol. 1, p. 688.          | (6) 14 Legal News 369; <i>post</i> , p. 386.        |
| (2) 36 U. C. Q. B. 183.  | (7) 24 Can. S. C. R. 145.                           |
| (3) 2 Russell & Chesley 5; <i>ante</i> , vol. 2, pp. 400, 409. | (8) L. R. 6; P. C. 31; <i>ante</i> , vol. 1, p. 63. |
| (4) 18 Ont. App. Rep. 572, <i>post</i> , p. 369.               | (9) [1894] A. C. 189; <i>ante</i> , p. 266.         |
| (5) 7 Montreal L. R. Q. B., 281.                               | (10) 12 App. Cas. 575; <i>ante</i> , vol. 4, p. 7.  |

Canada Temperance Act, s. 99. The subject of this reference is prohibition. *Russell v. Reg.* (1) ruled that prohibition as dealt with by the Canada Temperance Act was excluded from provincial authority.

(LORD HERSCHELL. No; not while the provincial legislature deals with the matter locally.)

Prohibition of the liquor traffic does not fall within any of the subjects enumerated in s. 92. The exclusive power with regard to municipal institutions only enables the legislatures to establish regulations for carrying on such institutions. Any authority which the legislatures can confer upon them must be derived from or have relation to the other subjects enumerated in s. 92, none of which include a power to prohibit. They can prescribe the mode in which the traffic may be carried on, but they cannot prohibit it. Sub-sect. 16, s. 92, relates to "local or private" matters, not provincial. On the other hand, prohibition strictly relates to matters within the exclusive power of the Dominion Parliament. It affects the peace, order, and good government of Canada in relation to matters not coming within those assigned by s. 92 to the provinces. To the Dominion is assigned authority to regulate trade and commerce. See *City of Fredericton v. Reg.* (2); *Russell v. Reg.* (1); *Tennant v. Union Bank* (3). It was contended that whether or not regulation involves prohibition, if the provinces may prohibit, the Dominion has nothing left to regulate. The provincial power of regulating a particular trade recognised in *Hodge v. Reg.* (4) must not be pushed so as to conflict with Dominion legislation; for wherever the two legislatures conflict that of the Dominion must be paramount. Here the field of legislation, that is with regard

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(1) 7 App. Cas. 829; *ante*, vol 2, p. 12.

(3) [1894] A. C. 31; *ante*, p. 244.

(2) 3 Can. S. C. R. 505, *ante*, vol. 2, p. 27.

(4) 9 App. Cas. 117; *ante*, vol. 3, p. 144.

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to the prohibition of the liquor traffic, is already occupied [354] by the Canada Temperance Act, and there is therefore no room for a provincial law, for the interference of the province would interfere with the legislation of the Dominion.

(LORD WATSON. Where the Temperance Act is not adopted, there is no law as yet applicable, and there the field is not covered.)

The legislation exists which at any moment the community may bring into force.

*Blake, Q.C.*, contended that the provinces have no legislative authority except in the subjects enumerated in s. 92, according to the true construction of the British North America Act as ascertained by the Privy Council. On any matter so enumerated the provinces have no authority in any case wherein, or to any extent whereby, the exercise of such authority would interfere with the exercise by the Dominion of any authority comprised within any of the sub-sections of s. 91. Again, the subject of the prohibition of retail selling of intoxicating liquors is not comprised within s. 92 according to the same authoritative construction; and it follows that a fortiori the prohibition of wholesale selling, or manufacturing, or importing, is not so comprised. Then it is settled that each of these subjects, being without the scope of s. 92, is within the general authority of the Dominion conferred by s. 91 for peace, order, and good government. The regulation of trade and commerce is placed by s. 91 under the exclusive authority of the Dominion, the object being to place the trade of the various provinces under the general control of the central authority, and thus effect uniformity as far as possible, and also enable the Dominion to obtain by an indirect system of taxation the amounts necessary to enable it to discharge the national obligations. The customs and



excise duties on liquor are a substantial and necessary part of the fiscal resources of the Dominion, and it was not intended that those resources should be curtailed or abolished by the provincial legislatures throughout their jurisdiction. Exclusive authority over the liquor trade in its trade and revenue aspects means an authority to prevent any rival control over them which might impede the purposes for which such exclusive authority was granted. Besides, there is a broad distinction between [355] an authority to prohibit a trade and an authority to regulate it, and even if, according to the appellant's argument, the provincial legislature could, under the subsection relating to municipal institutions, regulate it, the power to prohibit nevertheless exclusively belongs to the Dominion. Sect. 18 of the Ontario Act purports to deal with a subject which comes under s. 91, sub-s. 2. It conflicts with the Canada Temperance Act, which covers the whole field of legislation, and therefore with the paramount authority of the Dominion, and, moreover, cannot be validated as a revival of pre-confederation law. Before confederation each province had full legislative authority, and one of them tried the experiment of entrusting municipalities with prohibitive power. But neither in the practice of the four provinces, nor in the nature of the subject, nor in the methods of the United Kingdom, is there any established meaning attached to the phrase "municipal institutions" which includes the subject of s. 18. Reference was made to *Reg. v. Justices of Kings* (1) and *Severn v. Reg.* (2), and to the cases cited by the appellant.

*MacLaren*, Q.C., replied.

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(1) 2 Pugsley 535; *ante*, vol. 2, p. 499.

(2) 2 Can. S. C. R. 70; *ante*, vol. 1, p. 414.

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The judgment of their Lordships was delivered by

LORD WATSON:—

Their Lordships think it expedient to deal, in the first instance, with the seventh question, because it raises a practical issue, to which the able arguments of counsel on both sides of the bar were chiefly directed, and also because it involves considerations which have a material bearing upon the answers to be given to the other six questions submitted in this appeal. In order to appreciate the merits of the controversy, it is necessary to refer to certain laws for the restriction or suppression of the liquor traffic which were passed by the Legislature of the old Province of Canada before the Union, or have since been enacted by the Parliament of the Dominion, and by the Legislature of Ontario respectively.

At the time when the British North America Act of 1867 came into operation, the statute book of the old province contained two sets of enactments applicable [356] to Upper Canada, which, though differing in expression, were in substance very similar.

7 The most recent of these enactments were embodied in the Temperance Act, 1864 (27 & 28 Vict. c. 18), which conferred upon the municipal council of every county, town, township or incorporated village, "besides the powers at present conferred on it by law," power at any time to pass a by-law prohibiting the sale of intoxicating liquors, and the issue of licenses therefor, within the limits of the municipality. Such by-law was not to take effect until submitted to and approved by a majority of the qualified electors; and provision was made for its subsequent repeal in deference to an adverse vote of the electors.

The previous enactments relating to the same subject, which were in force at the time of the Union, were contained in the Consolidated Municipal Act, 29 & 30 Vict.

c. 51. They empowered the council of every township, town and incorporated village, and the commissioners of police in cities, to make by-laws for prohibiting the sale by retail of spirituous, fermented, or other manufactured liquors in any inn or other house of public entertainment; and for prohibiting totally the sale thereof in shops and places other than houses of public entertainment; provided the by-law, before the final passing thereof, had been duly approved by the electors of the municipality in the manner prescribed by the Act. After the Union the Legislature of Ontario inserted these enactments in the Tavern and Shop License Act, 32 Vict. c. 32. They were purposely omitted from subsequent consolidations of the Municipal and Liquor License Acts; and, in the year 1886, when the Canada Temperance Act was passed by the Parliament of Canada, there was no provincial law authorizing the prohibition of liquor sales in Ontario, save the Temperance Act, 1864.

The Canada Temperance Act of 1886 (Revised Statutes of Canada, 49 Vict. c. 106) is applicable to all the provinces of the Dominion. Its general scheme is to give to the electors of every county or city the option of adopting, or declining to adopt, the provisions of the second part of the Act, which make it unlawful for any person, "by [357] himself, his clerk, servant or agent, to expose or keep for sale, or directly or indirectly, on any pretence or upon any device, to sell or barter, or in consideration of the purchase of any other property, give to any other person any intoxicating liquor." It expressly declares that no violation of these enactments shall be made lawful by reason of any license of any description whatsoever. Certain relaxations are made in the case of sales of liquor for sacramental or medicinal purposes, or for exclusive use in some art, trade or manufacture. The prohibition does not extend to manufacturers, importers,

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or wholesale traders who sell liquors in quantities above a specified limit, when they have good reason to believe that the purchasers will forthwith carry their purchase beyond the limits of the county or city, or of any adjoining county or city in which the provisions of the Act are in force.

For the purpose of bringing the second part of the Act into operation an order of the Governor-General of Canada in Council is required. The order must be made on the petition of a county or city, which cannot be granted until it has been put to the vote of the electors of such county or city. When a majority of the votes polled are adverse to the petition, it must be dismissed; and no similar application can be made within the period of three years from the day on which the poll was taken. When the vote is in favour of the petition, and is followed by an Order in Council, one-fourth of the qualified electors of the county or city may apply to the Governor-General in Council for a recall of the order which is to be granted in the event of a majority of the electors voting in favour of the application. Power is given to the Governor-General in Council to issue in the like manner, and after similar procedure, an order repealing any by-law passed by any municipal council for the application of the Temperance Act of 1864. *Provincial Act*

The Dominion Act also contains an express repeal of the prohibitory clauses of the provincial Act of 1864, and of the machinery thereby provided for bringing them into operation, (1.) as to every municipality within the limits of Ontario in which, at the passing of the Act of 1886, there was no municipal by-law in force, (2.) as [358] to every municipality within these limits in which a prohibitive by-law then in force shall be subsequently repealed under the provisions of either Act, and (3.) as to every municipality having a municipal by-law which is included in the limits of, or has the same limits

with, any county or city in which the second part of the Canada Temperance Act is brought into force before the repeal of the by-law, which by-law, in that event, is declared to be null and void.

With the view of restoring to municipalities within the province whose powers were affected by that repeal the right to make by-laws which they had possessed under the law of the old province, the Legislature of Ontario passed s. 18 of 53 Vict. c. 56, to which the seventh question in this case relates. The enacting words of the clause are introduced by a preamble which recites the previous course of legislation, and the repeal by the Canada Temperance Act of the Upper Canada Act of 1864 in municipalities where not in force, and concludes thus: "it is expedient that municipalities should have the powers by them formerly possessed." The enacting words of the clause, with the exception of one or two changes of expression which do not affect its substance, are a mere reproduction of the provisions, not of the Temperance Act of 1864, but of the kindred provisions of the Municipal Act (29 & 30 Vict. c. 51), which had been omitted from the consolidated statutes of the province. A new proviso is added, to the effect that "nothing in this section contained shall be construed into an exercise of jurisdiction by the province of Ontario beyond the revival of provisions of law which were in force at the date of the passing of the British North America Act, and which the subsequent legislation of this province purported to repeal. The Legislature of Ontario subsequently passed an Act (54 Vict. c. 46) for the purpose of explaining that s. 18 was not meant to repeal by implication certain provisions of the Municipal Act (29 & 30 Vict. c. 51), which limit its application to retail dealings.

The seventh question raises the issue, whether, in the circumstances which have just been detailed, the Provin-

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cial Legislature had authority to enact s. 18. In order to determine that issue, it becomes necessary to consider, in the first place, whether the Parliament of Canada [359] had jurisdiction to enact the Canada Temperance Act; and, if so, to consider in the second place whether after that Act became the law of each province of the Dominion, there yet remained power with the Legislature of Ontario to enact the provisions of s. 18.

The authority of the Dominion Parliament to make laws for the suppression of liquor traffic in the provinces is maintained, in the first place, upon the ground that such legislation deals with matters affecting "the peace, order, and good government of Canada," within the meaning of the introductory and general enactments of s. 91 of the British North America Act; and, in the second place, upon the ground that it concerns "the regulation of trade and commerce," being No. 2 of the enumerated classes of subjects which are placed under the exclusive jurisdiction of the Federal Parliament by that section. These sources of jurisdiction are in themselves distinct, and are to be found in different enactments.

It was apparently contemplated by the framers of the Imperial Act of 1867 that the due exercise of the enumerated powers conferred upon the Parliament of Canada by s. 91 might, occasionally and incidentally, involve legislation upon matters which are *primâ facie* committed exclusively to the provincial legislatures by s. 92. In order to provide against that contingency, the concluding part of s. 91 enacts that "any matter coming within any of the classes of subjects enumerated in this section shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration of the classes of subjects by this Act assigned exclusively to the legislatures of the provinces." It was observed by this Board in *Citizens' Insurance Co. v. Parsons* (1)



that the paragraph just quoted "applies in its grammatical construction only to No. 16 of s. 92." The observation was not material to the question arising in that case, and it does not appear to their Lordships to be strictly accurate. It appears to them that the language of the exception in s. 91 was meant to include and correctly describes all the matters enumerated in the sixteen heads of s. 92, as being, from a provincial point of view, of a local or private nature. It also appears to their [360] Lordships that the exception was not meant to derogate from the legislative authority given to provincial legislatures by these sixteen sub-sections, save to the extent of enabling the Parliament of Canada to deal with matters local or private in those cases where such legislation is necessarily incidental to the exercise of the powers conferred upon it by the enumerative heads of clause 91. That view was stated and illustrated by Sir Montague Smith in *Citizens' Insurance Co. v. Parsons* (1) and in *Cushing v. Dupuy* (2); and it has been recognised by this Board in *Tennant v. Union Bank of Canada* (3) and in *Attorney-General of Ontario v. Attorney-General for the Dominion* (4).

The general authority given to the Canadian Parliament by the introductory enactments of s. 91 is "to make laws for the peace, order and good government of Canada, in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the legislatures of the provinces"; and it is declared, but not so as to restrict the generality of these words, that the exclusive authority of the Canadian Parliament extends to all matters coming within the classes of subjects which are enumerated in the clause. There may, therefore, be matters not included in the enumeration, upon which the

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(1) 7 App. Cas. pp. 108, 109; *ante*, vol. 1, pp. 272, 273.

(2) 5 App. Cas. 409, 415; *ante*, vol. 1, pp. 252, 258.

(3) [1894] A. C. 31, 46; *ante*, pp. 244, 263.

(4) [1894] A. C. 189, 200; *ante*, pp. 266, 280.

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Parliament of Canada has power to legislate, because they concern the peace, order, and good government of the Dominion. But to those matters which are not specified among the enumerated subjects of legislation, the exception from s. 92, which is enacted by the concluding words of s. 91, has no application; and, in legislating with regard to such matters, the Dominion Parliament has no authority to encroach upon any class of subjects which is exclusively assigned to provincial legislatures by s. 92. These enactments appear to their Lordships to indicate that the exercise of legislative power by the Parliament of Canada, in regard to all matters not enumerated in s. 91, ought to be strictly confined to such matters as are unquestionably of Canadian interest and importance, and ought not to trench upon provincial legislation with respect to any of the classes of subjects enumerated in s. [361] 92. To attach any other construction to the general power which, in supplement of its enumerated powers, is conferred upon the Parliament of Canada by s. 91, would, in their Lordships' opinion, not only be contrary to the intendment of the Act, but would practically destroy the autonomy of the provinces. If it were once conceded that the Parliament of Canada has authority to make laws applicable to the whole Dominion, in relation to matters which in each province are substantially of local or private interest upon the assumption that these matters also concern the peace, order, and good government of the Dominion, there is hardly a subject enumerated in s. 92 upon which it might not legislate, to the exclusion of the provincial legislatures.

In construing the introductory enactments of s. 91 with respect to matters other than those enumerated, which concern the peace, order, and good government of Canada, it must be kept in view that s. 94, which empowers the Parliament of Canada to make provision for the uniformity of the laws relative to property and civil rights



in Ontario, Nova Scotia and New Brunswick does not extend to the province of Quebec; and also that the Dominion legislation thereby authorized is expressly declared to be of no effect unless and until it has been adopted and enacted by the provincial legislature. These enactments would be idle and abortive, if it were held that the Parliament of Canada derives jurisdiction from the introductory provisions of s. 91, to deal with any matter which is in substance local or provincial, and does not truly affect the interest of the Dominion as a whole.

Their Lordships do not doubt that some matters, in their origin local and provincial, might attain such dimensions as to affect the body politic of the Dominion, and to justify the Canadian Parliament in passing laws for their regulation or abolition in the interest of the Dominion.

But great caution must be observed in distinguishing between that which is local and provincial, and therefore within the jurisdiction of the provincial legislatures, and that which has ceased to be merely local or provincial, and has become matter of national concern, in such sense as to bring it within the jurisdiction of the Parliament of

[362] Canada. An Act restricting the right to carry weapons of offence, or their sale to young persons, within the province would be within the authority of the provincial legislature. But traffic in arms, or the possession of them under such circumstances as to raise a suspicion that they were to be used for seditious purposes, or against a foreign State, are matters which, their Lordships conceive, might be competently dealt with by the Parliament of the Dominion.

The judgment of this Board in *Russell v. Reg.* (1) has relieved their Lordships from the difficult duty of considering whether the Canada Temperance Act of 1886 relates to the peace, order, and good government of Canada, in such sense as to bring its provisions within

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the competency of the Canadian Parliament. In that case the controversy related to the validity of the Canada Temperance Act of 1878 ; and neither the Dominion nor the Provinces were represented in the argument. It arose between a private prosecutor and a person who had been convicted, at his instance, of violating the provisions of the Canadian Act within a district of New Brunswick, in which the prohibitory clauses of the Act had been adopted. But the provisions of the Act of 1878 were in all material respects the same with those which are now embodied in the Canada Temperance Act of 1886, and the reasons which were assigned for sustaining the validity of the earlier, are, in their Lordships' opinion, equally applicable to the later Act. It therefore appears to them that the decision in *Russell v. Reg.* (1) must be accepted as an authority to the extent to which it goes, namely, that the restrictive provisions of the Act of 1886, when they have been duly brought into operation in any provincial area within the Dominion, must receive effect as valid enactments relating to the peace, order, and good government of Canada.

That point being settled by decision, it becomes necessary to consider whether the Parliament of Canada had authority to pass the Temperance Act of 1886, as being an Act for the "regulation of trade and commerce" within the meaning of No. 2 of s. 91. If it were so, the [363] Parliament of Canada would, under the exception from s. 92 which has already been noticed, be at liberty to exercise its legislative authority, although in so doing it should interfere with the jurisdiction of the provinces. The scope and effect of No. 2 of s. 91 were discussed by this Board at some length in *Citizens Insurance Co. v. Parsons* (1), where it was decided that, in the absence of legislation upon the subject by the Canadian Parliament, the legislature of Ontario had authority to impose

conditions, as being matters of civil right, upon the business of fire insurance, which was admitted to be a trade, so long as those conditions only affected provincial trade. Their Lordships do not find it necessary to reopen that discussion in the present case. The object of the Canada Temperance Act of 1886 is, not to regulate retail transactions between those who trade in liquor and their customers but to abolish all such transactions within every provincial area in which its enactments have been adopted by a majority of the local electors. A power to regulate, naturally, if not necessarily, assumes, unless it is enlarged by the context, the conservation of the thing which is to be made the subject of regulation. In that view, their Lordships are unable to regard the prohibitive enactments of the Canadian statute of 1886 as regulations of trade and commerce. They see no reason to modify the opinion which was recently expressed on their behalf by Lord Davey in *Municipal Corporation of the City of Toronto v. Virgo* (1) in these terms: "Their Lordships think there is a marked distinction to be drawn between the prohibition or prevention of a trade and the regulation or governance of it, and indeed a power to regulate and govern seems to imply the continued existence of that which is to be regulated or governed."

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The authority of the Legislature of Ontario to enact s. 18 of 53 Vict. c. 56, was asserted by the appellant on various grounds. The first of these, which was very strongly insisted on, was to the effect that the power given to each province by No. 8 of s. 92 to create municipal institutions in the province necessarily implies the right to endow these institutions with all the administrative functions which had been ordinarily possessed [364] and exercised by them before the time of the union. Their Lordships can find nothing to support that

(1) [1896] A. C. 93.



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contention in the language of s. 92, No. 8, which, according to its natural meaning, simply gives provincial legislatures the right to create a legal body for the management of municipal affairs. Until confederation, the Legislature of each province as then constituted could if it chose, and did in some cases, entrust to a municipality the execution of powers which now belong exclusively to the Parliament of Canada. Since its date a provincial Legislature cannot delegate any power which it does not possess and the extent and nature of the functions which it can commit to a municipal body of its own creation must depend upon the legislative authority which it derives from the provisions of s. 92 other than No. 8.

— Their Lordships are likewise of opinion that s. 92, No. 9, does not give provincial legislatures any right to make laws for the abolition of the liquor traffic. It assigns to them “shop, saloon, tavern, auctioneer and other licenses in order to the raising of a revenue for provincial, local or municipal purposes.” It was held by this Board in *Hodge v. Reg.* (1) to include the right to impose reasonable conditions upon the licensees which are in the nature of regulation; but it cannot, with any show of reason, be construed as authorizing the abolition of the sources from which revenue is to be raised.

# The only enactments of s. 92 which appear to their Lordships to have any relation to the authority of provincial legislatures to make laws for the suppression of the liquor traffic are to be found in Nos. 13 and 16, which assign to their exclusive jurisdiction, (1.) “property and civil rights in the province,” and (2.) “generally all matters of a merely local or private nature in the province.” A law which prohibits retail transactions and restricts the consumption of liquor within the ambit of the province, and does not affect transactions in liquor



between persons in the province and persons in other provinces or in foreign countries, concerns property in the province which would be the subject-matter of the transactions if they were not prohibited, and also the [365] civil rights of persons in the province. It is not impossible that the vice of intemperance may prevail in particular localities within a province to such an extent as to constitute its cure by restricting or prohibiting the sale of liquor a matter of a merely local or private nature and therefore falling *prima facie* within No. 16. In that state of matters, it is conceded that the Parliament of Canada could not imperatively enact a prohibitory law adapted and confined to the requirements of localities within the province where prohibition was urgently needed.

It is not necessary for the purposes of the present appeal to determine whether provincial legislation for the suppression of the liquor traffic, confined to matters which are provincial or local within the meaning of Nos. 13 and 16, is authorized by the one or by the other of these heads. It cannot, in their Lordships' opinion, be logically held to fall within both of them. In s. 92, No. 16, appears to them to have the same office which the general enactment with respect to matters concerning the peace, order, and good government of Canada, so far as supplementary of the enumerated subjects, fulfils in s. 91. It assigns to the provincial legislature all matters in a provincial sense local or private which have been omitted from the preceding enumeration, and although its terms are wide enough to cover, they were obviously not meant to include provincial legislation in relation to the classes of subjects already enumerated.

In the able and elaborate argument addressed to their Lordships on behalf of the respondents it was practically conceded that a provincial legislature must have power to deal with the restriction of the liquor traffic from a

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local and provincial point of view, unless it be held that the whole subject of restriction or abolition is exclusively committed to the Parliament of Canada as being within the regulation of trade and commerce. In that case the subject, in so far at least as it had been regulated by Canadian legislation, would by virtue of the concluding enactment of s. 91, be excepted from the matters committed to provincial legislatures by s. 92. Upon the assumption that s. 91 (2) does not embrace the right to suppress a trade, Mr. Blake maintained that, whilst [366] the restriction of the liquor traffic may be competently made matter of legislation in a provincial as well as a Canadian aspect, yet the Parliament of Canada has, by enacting the Temperance Act of 1886, occupied the whole possible field of legislation in either aspect, so as completely to exclude legislation by a province. That appears to their Lordships to be the real point of controversy raised by the question with which they are at present dealing; and before discussing the point it may be expedient to consider the relation in which Dominion and provincial legislation stand to each other.

It has been frequently recognised by this Board, and it may now be regarded as settled law, that according to the scheme of the British North America Act the enactments of the Parliament of Canada, in so far as these are within its competency, must override provincial legislation. But the Dominion Parliament has no authority conferred upon it by the Act to repeal directly any provincial statute, whether it does or does not come within the limits of jurisdiction prescribed by s. 92. The repeal of a provincial Act by the Parliament of Canada can only be effected by repugnancy between its provisions and the enactments of the Dominion; and if the existence of such repugnancy should become matter of dispute the controversy cannot be settled by the action either of the Dominion or of the provincial legislature, but must be sub-



#mitted to the judicial tribunals of the country. In their Lordships' opinion, the express repeal of the old provincial Act of 1864 by the Canada Temperance Act of 1886 was not within the authority of the Parliament of Canada. It is true that the Upper Canada Act of 1864 was continued in force within Ontario by s. 129 of the British North America Act, "until repealed, abolished, or altered by the Parliament of Canada, or by the provincial legislature, according to the authority of that Parliament or of that Legislature." It appears to their Lordships that neither the Parliament of Canada nor the provincial legislatures have authority to repeal statutes which they could not directly enact. Their Lordships had occasion, in *Dobie v. Temporalities Board* (1), to consider the power of repeal competent to the legislature of a province. In that case the Legislature of Quebec had repealed a statute continued in force after the Union by s. 129, which had this peculiarity, that its provisions applied both to Quebec and to Ontario, and were incapable of being severed so as to make them applicable to one of these provinces only. Their Lordships held (1.) that the powers conferred "upon the provincial legislatures of Ontario and Quebec to repeal and alter the statutes of the old Parliament of the province of Canada are made precisely co-extensive with the powers of direct legislation with which these bodies are invested by the other clauses of the Act of 1867," and that it was beyond the authority of the Legislature of Quebec to repeal statutory enactments which affected both Quebec and Ontario. The same principle ought, in the opinion of their Lordships, to be applied to the present case. The old Temperance Act of 1864 was passed for Upper Canada, or, in other words, for the province of Ontario; and its provisions, being confined to that province only, could not have been directly enacted by the Parliament of

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(1) 7 App. Cas. 136; *ante*, vol. 1, p. 351.



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Canada. In the present case the Parliament of Canada would have no power to pass a prohibitory law for the province of Ontario, and could therefore have no authority to repeal in express terms an Act which is limited in its operation to that province. In like manner the express repeal, in the Canada Temperance Act of 1886, of liquor prohibitions adopted by a municipality in the province of Ontario under the sanction of provincial legislation does not appear to their Lordships to be within the authority of the Dominion Parliament.

The question must next be considered whether the provincial enactments of s. 18 to any, and if so to what extent, come into collision with the provisions of the Canadian Act of 1886. In so far as they do, provincial must yield to Dominion legislation, and must remain in abeyance unless and until the Act of 1886 is repealed by the Parliament which passed it.

The prohibitions of the Dominion Act have in some respects an effect which may extend beyond the limits of a province, and they are all of a very stringent character. They draw an arbitrary line at eight gallons in the case of beer, and at ten gallons in the case of other intoxicating liquors, with the view of discriminating between wholesale and retail transactions. Below the limit, sales within a district which has adopted the Act are absolutely forbidden, except to the two nominees of the Lieutenant-Governor of the province, who are only allowed to dispose of their purchases in small quantities for medicinal and other specified purposes. In the case of sales above the limit the rule is different. The manufacturers of pure native wines from grapes grown in Canada have special favour shewn them. Manufacturers of other liquors within the district, as also merchants duly licensed, who carry on an exclusively wholesale business, may sell for delivery anywhere beyond the district, unless such delivery is to be made in an adjoining dis-

trict where the Act is in force. If the adjoining district happened to be in a different province, it appears to their Lordships to be doubtful whether, even in the absence of Dominion legislation, a restriction of that kind could be enacted by a provincial legislature.

On the other hand, the prohibitions which s. 18 authorizes municipalities to impose within their respective limits do not appear to their Lordships to affect any transactions in liquor which have not their beginning and their end within the province of Ontario. The first branch of its prohibitory enactment strikes against sales of liquor by retail in any tavern or other house or other place of public entertainment. The second extends to sales in shops and places other than houses of public entertainment; but the context indicates that it is only meant to apply to retail transactions; and that intention is made clear by the terms of the explanatory Act 54 Vict., c. 46, which fixes the line between wholesale and retail at one dozen of liquor in bottles, and five gallons if sold in other receptacles. The importer or manufacturer can sell any quantity above that limit, and any retail trader may do the same, provided that he sells the liquor in the original packages in which it was received by him from the importer or manufacturer.

It thus appears that, in their local application within the province of Ontario, there would be considerable difference between the two laws; but it is obvious that their provisions could not be in force within the same [569] district or province at one and the same time. In the opinion of their Lordships, the question of conflict between their provisions which arises in this case does not depend upon their identity or non-identity, but upon a feature which is common to both. Neither statute is imperative, their prohibitions being of no force or effect until they have been voluntarily adopted and applied by the vote of the majority of the electors in a district or

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municipality. In *Russell v. Reg.* (1) it was observed by this Board, with reference to the Canada Temperance Act of 1878, "The Act as soon as it was passed became a law for the whole Dominion, and the enactments of the first part, relating to the machinery for bringing the second part into force, took effect and might be put in motion at once and everywhere within it." No fault can be found with the accuracy of that statement. *Mutatis mutandis*, it is equally true as a description of the provisions of s. 18. But in neither case can the statement mean more than this, that on the passing of the Act each district or municipality within the Dominion or the province, as the case might be, became vested with a right to adopt and enforce certain prohibitions if it thought fit to do so. But the prohibitions of these Acts, which constitute their object and their essence, cannot with the least degree of accuracy be said to be in force anywhere until they have been locally adopted.

If the prohibitions of the Canada Temperance Act had been made imperative throughout the Dominion, their Lordships might have been constrained by previous authority to hold that the jurisdiction of the Legislature of Ontario to pass s. 18 or any similar law had been superseded. In that case no provincial prohibitions such as are sanctioned by s. 18 could have been enforced by a municipality without coming into conflict with the paramount law of Canada. For the same reason provincial prohibitions in force within a particular district will necessarily become inoperative whenever the prohibitory clauses of the Act of 1886 have been adopted by that district. But their Lordships can discover no adequate grounds for holding that there exists repugnancy between the two laws in districts of the province of Ontario [370] where the prohibitions of the Canadian Act are not and may never be in force. In a district which has

(1) 7 App. Cas. 829, 841; *ante*, vol. 2, pp. 12, 25.



by the votes of its electors, rejected the second part of the Canadian Act, the option is abolished for three years from the date of the poll, and it hardly admits of doubt that there could be no repugnancy whilst the option given by the Canadian Act was suspended. The Parliament of Canada has not, either expressly or by implication, enacted that so long as any district delays or refuses to accept the prohibitions which it has authorized, the provincial parliament is to be debarred from exercising the legislative authority given it by s. 92 for the suppression of the drink traffic as a local evil. Any such legislation would be unexampled, and it is a grave question whether it would be lawful. Even if the provisions of s. 18 had been imperative, they would not have taken away or impaired the right of any district in Ontario to adopt, and thereby bring into force, the prohibitions of the Canadian Act.

11 Their Lordships, for these reasons, give a general answer to the seventh question in the affirmative. They are of opinion that the Ontario Legislature had jurisdiction to enact s. 18, subject to this necessary qualification, that its provisions are or will become inoperative in any district of the province which has already adopted, or may subsequently adopt, the second part of the Canada Temperance Act of 1886.

Their Lordships will now answer briefly, in their order, the other questions submitted by the Governor-General of Canada. So far as they can ascertain from the record, these differ from the question which has already been answered in this respect, that they relate to matters which may possibly become litigious in the future, but have not as yet given rise to any real and present controversy. Their Lordships must further observe that these questions, being in their nature academic rather than judicial, are better fitted for the consideration of the officers of the Crown than of a

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court of law. The replies to be given to them will necessarily depend upon the circumstances in which they may rise for decision; and these circumstances are in this case left to speculation. It must, therefore, be understood that the answers which follow are not meant to have, and cannot have, the weight of a judicial determination, except in so far as their Lordships may have occasion to refer to the opinions which they have already expressed in discussing the seventh question.

Answers to questions 1 and 2.—Their Lordships think it sufficient to refer to the opinions expressed by them in disposing of the seventh question.

Answer to question 3.—In the absence of conflicting legislation by the Parliament of Canada, their Lordships are of opinion that the provincial legislatures would have jurisdiction to that effect if it were shewn that the manufacture was carried on under such circumstances and conditions as to make its prohibition a merely local matter in the province.

Answer to question 4.—Their Lordships answer this question in the negative. It appears to them that the exercise by the provincial legislature of such jurisdiction in the wide and general terms in which it is expressed would probably trench upon the exclusive authority of the Dominion Parliament.

Answers to questions 5 and 6.—Their Lordships consider it unnecessary to give a categorical reply to either of these questions. Their opinion upon the points which the questions involve has been sufficiently explained in their answer to the seventh question.

Their Lordships will humbly advise Her Majesty to discharge the order of the Supreme Court of Canada dated January 15, 1895; and to substitute therefor the several answers to the seven questions submitted by the Governor-General of Canada which have been already indicated. There will be no costs of this appeal.



## JUDGMENTS IN SUPREME COURT OF CANADA.

[Reported 24 Can. S.C.R. 170.]

STRONG C. J. :—

My reasons for the foregoing answers will appear from my judgment in *Huson v. South Norwich* (1). I have only to add that I do not think any statutory definition of the terms “ wholesale ” and “ retail ” is requisite, but if legislation is required for such purpose it is vested in the Dominion as appertaining to the regulation of trade and commerce.

I answer the third and fourth questions in the negative, because the prohibition of manufacture and importation would affect trade and commerce, and so must belong to the Dominion ; and further, for the reason that prohibition to that extent would affect the revenue of the Dominion derived from the customs and excise duties.

(1) *HUSON v. SOUTH NORWICH.*

[Reported 24 Can. S.C.R. 145]

STRONG C. J. :—

ALL questions involved in this appeal, save that relating to the constitutional validity of the 18th section of the Ontario Statute, 53 Vict. c. 56, entitled : “ An Act to improve the Liquor License Laws,” as explained and limited by the Ontario Statute, 54 Vict. c. 46, section 1, have been already disposed of. This remaining point we have now to determine.

I am of opinion that these enactments were intra vires of the provincial legislature. The learned Judges of the Court of Appeal, in the case of the *Local Option Act* (18 App. Rev. 572, *post*, p. 369), have dealt fully with this identical question, and I so entirely agree with both their reasons and conclusions, that I might well have contented myself with a reference to that case without adding to the mass of judicial decisions already accumulated

on the subject. There appear to me, however, to be some additional reasons, which I will state as succinctly as possible.

We are precluded by the decision of the Privy Council in the case of *Russell v. The Queen* (7 App. Cas. 829 ; *ante*, vol. 2, p. 12.), and by that of this court in the *City of Fredericton v. The Queen* (3 Can. S.C. R. 505 ; *ante*, vol. 2, p. 27), from holding that under sub-sect. 8 of sect. 92 of the British North America Act, the exclusive power of prohibiting the sale of liquor by retail, [147] including the enactment of what are called local option laws, was given to the provinces as an incident of the police power conferred by the words “ municipal institutions.” That those words do confer a police power to the extent of licensing and regulating was decided by the Privy Council in the case of *Hodge v. The Queen* (9 App. Cas.

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I concur in the conclusions arrived at by the Chief Justice of this Court, and adopt his answers to the seven questions submitted.

117; *ante*, vol. 3, p. 144). The question then is narrowed to this : Have the provinces, under this sub-sect. 8, a power concurrent with that of the Dominion to enact prohibitory legislation to be carried into effect through the instrumentality of the municipalities or otherwise, either generally or to the extent of the power of prohibiting which had been conferred on municipal bodies by legislation enacted prior to confederation and in force at that date.

It is established by *Russell v. The Queen* (7 App. Cas. 829; *ante*, vol. 2, p. 12), that the Dominion, being invested with authority by sect. 91 to make laws for the peace, order and good government of Canada, may pass what are denominated local option laws. But as I understand that decision, such Dominion laws must be general laws, not limited to any particular province. It is not competent to Parliament to draw to itself the right to legislate on any subject which by sect. 92 is assigned to the provinces by legislating on that subject generally for the whole Dominion, but this is, of course, not done where, in the execution of a power expressly given to it by sect. 91, the Federal Legislature makes laws similar to those which a Provincial Legislature may make in executing other powers expressly given to the provinces by sect. 92. Therefore it appears to me that there are in the Dominion and the provinces, respectively, several and distinct powers authorizing each, within its own sphere, to enact the same legislation on this subject of prohibitory liquor laws re-

[148] straining sale by retail, that is to say, the Dominion may, as has already been conclusively decided, enact a prohibitory law for the whole Dominion, whilst the provincial legislatures may also enact similar laws, restricted, of course, to their own jurisdictions. Such provincial legislation cannot, however, be extended so as to prohibit importation or manufacture, for the reason that these subjects belong exclusively to the Dominion under the head of trade and commerce, and also for the additional reason that the revenue of the Dominion derived from customs and excise duties would be thereby affected. That there may be, in respect of other subjects, such concurrent powers of legislation has already been decided by the Privy Council in the case of *Attorney-General of Ontario v. Attorney-General for Canada* ([1894] A. C. 189; *ante*, p. 266) where this question arose with reference to insolvency legislation. I venture to think the present even a stronger case for the application of such a construction than that referred to. To neither of the legislatures is the subject of prohibitory liquor laws in terms assigned. Then what reason is there why a local legislature in execution of the police power conferred by sub-sect. 8. of sect. 92 may not, so long as it does not come in conflict with the legislation of the Dominion, adopt any appropriate means of executing that power, merely because the same means may be adopted by the Dominion Parliament under the authority of sect. 91 in executing a

GWYNNE, J. :—

[After stating the questions submitted, his Lordship proceeded as follows :]

In construing the language of the British North America Act of 1867 defining the jurisdiction of the Dominion Parliament and of the provincial legislatures we must never lose sight of the fact that this language is that of the resolutions adopted in 1864 by the provin-

power specifically given to it. It has been decided by the highest authority that there are no reasons against such a construction. This is indeed even a stronger case for recognizing such a concurrent power than the case of *Attorney General of Ontario v. Attorney General for Canada* ([1894] A. C. 189 ; *ante*, p. 266) because bankruptcy and insolvency laws are by sect. 91 expressly attributed to the exclusive jurisdiction [149] of the Dominion. In the event of legislation providing for prohibition enacted by the Dominion and by a province coming into conflict, the legislation of the province would no doubt have to give way. This was pointed out by the Privy Council in the *Attorney-General for Ontario v. Attorney-General for Canada* ([1894] A. C. 189 ; *ante*, p. 266) and although the British North America Act contains no provision declaring that the legislation of the Dominion shall be supreme, as is the case in the constitution of the United States, the same principle is necessarily implied in our constitutional Act, and is to be applied whenever in the many cases which may arise, the federal and provincial legislatures adopt the same means to carry into effect distinct powers.

That a general police power sufficient to include the right of legislating to the extent of the prohibition of retail traffic or local option laws, not exclusive of but concur-

rent with a similar power in the Dominion, is vested in the provinces by the words "Municipal Institutions in the Province" in sub-sect. 8 of sect. 92 is, I think, a proposition which derives support from the case of *Hodge v. The Queen* (9 App. Cas. 117 ; *ante*, vol. 3, p. 144). It is true that the subject of prohibition was not in question in that case, but there would seem to be no reason why prohibitory laws as well as those regulating and limiting the traffic in liquors should not be included in the police power which under the words "Municipal Institutions" it was held in *Hodge v. The Queen*, to the extent of licensing, the provinces possessed. The difference between regulating and licensing, and prohibiting is one of degree only.

As regards the objection that to recognize any such right of legislation in a province not extending to the prohibition of importation and [150] manufacture would be an infringement of the power of the Dominion to regulate trade and commerce, I am not impressed by it. The retail liquor traffic can scarcely be regarded as coming directly under the head of trade and commerce as used in the British North America Act, but as the subjects enumerated in sect. 92 are exceptions out of those mentioned in sect. 91, it follows that if a police power is included in sub-sect. 8 of the former section, the power itself

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[205] cial statesmen assembled in Quebec by the authority of Her Most Gracious Majesty for the purpose of framing the provisions of a constitution for federally uniting the British North American provinces into one government under the British Crown and that the British North America Act was passed merely for the purpose of giving legislative form to the terms and provisions of a treaty of union between the respective provinces forming the confederation and the Imperial Government, as such terms and provisions are

and all appropriate means of carrying it out are to be treated as uncontrolled by anything in sect. 91. Moreover, *Hodge v. The Queen* (9 App. Cas. 117; *ante*, vol. 3, p. 144), also applies here, for although in a lesser degree, yet to some extent, the restriction of the liquor trade by a licensing system would affect trade and commerce. On the whole, I am of opinion that the provincial legislatures have power to enact prohibitory legislation to the extent I have mentioned, though this power is in no way exclusive of that of the Dominion, but concurrent with it.

If I am wrong in this conclusion it is sufficient for the decision of this appeal to hold, as I do, that the legislature of Ontario had power to repeal and re-enact the legislation in force at the date of the confederation Act, which gave municipal councils the right to pass by-laws, absolutely prohibiting the sale of liquor by retail within certain local limits. Having regard to the history and objects of confederation, I can scarcely think it possible that it could have been intended by the framers of the British North America Act to detract in any way from the jurisdiction of the provinces over their own several systems of municipal government. If the words "Municipal Institutions" in sub-sect. 8 are to have any meaning attributed to them,

they must surely be taken as giving authority to repeal, re-enact, and remodel the laws relating to all [151] municipal legislation then in force. In *Slavin v. Orillia* (36 U. C. Q. B. 159; *ante*, vol. 1, p. 688), this was the view of the Ontario Court of Queen's Bench, and Chief Justice Richards, in his judgment on that case, puts forward powerful arguments in support of that conclusion. These reasons, as well as those given for the judgment of the Court of Appeal in the *Local Option Case* (18 App. Rep. 572; *post*, p. 369), have convinced me that at least to the extent last mentioned (even if I am wrong in my first proposition) the provinces have the power to legislate. As the enactments now in question are reproductions of those in force at the date of confederation, they were therefore intra vires of the Ontario legislature. In the case of *Severn v. The Queen* (2 Can. S. C. R. 70; *ante*, vol. 1, p. 414), I expressed some doubt as to the decision in *Slavin v. Orillia* upon the ground that the effect of that case would be to make the law vary in the different provinces. These observations were not material to the judgment I then gave, which was founded entirely on the 9th sub-sect. of sect. 92, and I have now come to the conclusion that they were not well founded.



expressed in the resolutions adopted by the framers of the constitution and by the respective legislatures of the Provinces of Canada, Nova Scotia and New Brunswick, and by the Imperial Government. So likewise must we keep ever present to our minds the fact that the main object of these provincial statesmen, who were the authors and founders of our new constitution, in framing their project of confederation, was to devise a scheme by which the best features of the constitution of the United States of America, rejecting the bad, should be grafted upon the British constitution; and to vest in the provincial legislatures exclusive jurisdiction over all matters of a purely provincial, local, municipal and domestic character, and in the general or central legislature exclusive jurisdiction over all matters in which, as being of a general, quasi-national and sovereign character the inhabitants of the several provinces might be said to have a common interest distinct from the particular interest they would have in matters affecting the local, municipal and domestic affairs of the particular province in which each should reside.

That this was the main design of the scheme of confederation proposed by the framers of our constitution, and as intended by the resolutions adopted by them, is abundantly apparent from the speeches accompanying the submission of the resolutions to the legislatures of the provinces for their adoption. The late Sir John [206] Macdonald, the chief of the provincial statesmen engaged in framing the resolutions, when presenting them to the legislature of the Province of Canada for their adoption, says :

“ We must consider the scheme in the light of a treaty ; the whole scheme of confederation, as propounded by the conference, as agreed to and sanctioned by the Canadian government, and as now presented for the consideration of the people and the legislature, bears upon its face the marks of compromise.”

And again :

“ In the proposed constitution all matters of general interest are to be dealt with by the general legislature, while the local legislatures will deal with matters of local interest.”

Again, referring to the constitution of the United States of America, he says :

“ We can now take advantage of the experience of the last seventy-eight years during which the constitution of the United States has existed, and I am strongly of opinion that we have in a great measure avoided in this system which we propose for the adoption of the people of Canada the defects which time and events have shewn to exist in the American constitution.”

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And again :

“ We have strengthened the general government, we have given the general legislature all the great subjects of legislation, we have conferred on them not only specifically and in detail all the powers which are incident to sovereignty, but we have expressly declared that all subjects of general interest not distinctly and exclusively conferred upon the local government and local legislatures shall be conferred upon the general government and legislature.”

And again :

“ I shall not detain the House by entering into a consideration at any length of the different powers conferred upon the general Parliament as contra distinguished from those reserved to the local legislatures, but any honourable member in examining the list of different subjects which are to be assigned to the general and local legislatures respectively will see that all the great questions which affect the general interests of the confederacy as a whole are confided to the Federal Parliament, while the local interests and local laws of each section are entrusted to the care of the local legislatures.”

[207] The late Mr. George Brown, then president of the executive council of the Province of Canada, and also one of the delegates who framed the constitution, said :

“ All matters of trade and commerce, banking and currency and all questions common to the whole people we have vested fully and unrestrictedly in the general government.”

And again :

“ The Crown authorized us specially to make this compact and has heartily approved of what we did.”

And he ascribed the terms of the scheme of confederation as embodied in the resolutions to Lord Durham's report wherein he suggested a union of the provinces, “ upon a plan of local government by elective bodies subordinate to the general legislature and exercising complete control over such local matters as do not come within the province of general legislation, and that a general executive upon an improved principle should be established, together with a supreme court of appeal for all the North American colonies.”

And, again, he said that :

“ No higher eulogy could be pronounced upon the scheme produced than that which he had heard from one of the foremost of British statesmen, namely, that the system of government which we propose seemed to him a happy compound of the best features of the British and American constitutions.”



Sir Geo. Etienne Cartier, then Attorney-General of Canada East and another of the framers of the constitution for the proposed confederacy, said as to the proposed scheme in advocacy of its adoption by the Canadian Legislature :

“ Questions of commerce, of international communication and all matters of general interest would be discussed and determined in the general legislature.”

And, again, he said that in all their proceedings the framers of the constitution had the approbation of the Imperial Government, and, in fine, he said :

“ I have already declared in my own name and on behalf of the Government that all the delegates who go to England will accept [208] from the Imperial Government no Act but one based upon the resolutions if adopted by the House and will not bring back any other.”

The resolutions having been adopted by the Legislatures of Canada, Nova Scotia, and New Brunswick were transmitted to the Imperial Government, and, at the request of that Government a conference was held upon them in England between delegates from those Provinces and the Imperial Government, at which conference the resolutions were adopted almost verbatim, with a slight modification as to the power of the executive Government of the confederacy introduced at the suggestion of the Imperial Government for the purpose of still further strengthening the central executive of the proposed confederacy, such modification consisting in expunging the 44th resolution, which proposed to vest in the provincial executive the power of pardon of criminal offences, as to which resolution Sir John Macdonald had said, when submitting the resolutions to the Canadian Legislature, that this was a subject of Imperial interest, and that if the Imperial Government should not be convinced by the argument they would be able to press upon them for the continuance of the clause (the 44th resolution) they could, of course, as the overruling power, set it aside. Accordingly at the conference in England it was, with the assent of the provincial delegates, set aside and expunged, and that power of pardon was vested in the central or general government, and in other respects the language of the resolutions was not only substantially but almost verbatim et literatim embodied in a bill agreed upon by the provincial delegates and the Imperial Government as the bill to be presented to Parliament to be passed into an Act.

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In Her Majesty's address to both Houses upon the opening of [209] Parliament in February, 1867, she was pleased to refer to the proposed scheme of confederation in the following manner :—

“Resolutions in favour of a more intimate union of the provinces of Canada, Nova Scotia and New Brunswick, have been passed in their several legislatures and delegates duly authorized and representing all classes of colonial parties and opinion, have concurred in the conditions upon which such a union may be best effected. In accordance with their wishes a bill will be submitted to you which, by the consolidation of colonial interests and resources will give strength to the several provinces as members of the same empire, and animated by feelings of loyalty to the same sovereign.”

Lord Carnarvon, then colonial minister, in presenting this bill to Parliament, explained its intent and purpose, saying, among other things, with reference to the said resolutions, that they, with some slight changes, formed the basis of the measure he was submitting to Parliament ; that to those resolutions all the British provinces in North America were consenting parties, and that the measure founded upon them must be accepted as a treaty of union. Then, referring to the distribution of powers, he said :—

“I now pass to that which is perhaps the most delicate and most important part of this measure, the distribution of powers between the central government and the local authorities ; in this, I think, is comprised the main theory and constitution of federal government ; on this depends the principal working of the new system.”

And again :

“The real object which we have in view is to give to the central government those high functions and almost sovereign powers by which general principles and uniformity of legislation may be secured in those questions that are of common import to all the provinces, and at the same time to retain for each province such an ample measure of municipal liberty and self-government as will allow, and, indeed, compel them to exercise those local powers which they can exercise with great advantage to the community.”

And again :

“In this bill the division of powers has been mainly effected by a distinct classification ; that classification is four-fold : 1st. Those subjects of legislation which are attributed to the central Parliament [210] exclusively ; 2nd. Those which belong to the provincial legislatures exclusively ; 3rd. Those which are the subject of concurrent legislation ; and, 4th. A particular subject which is dealt with exceptionally.”

Then, as to the subjects of concurrent jurisdiction, he says :

“ There is, as I have said, a concurrent power of legislation to be exercised by the central and the local Parliaments. It extends over three separate subjects, immigration, agriculture, and public works.”

Then, in reply to a question asked by a noble Lord, “ Whether by the terms of arrangement that had been come to, Parliament was precluded from making any alteration in the terms of the bill ? ”

He said that :

“ It was, of course, within the competence of Parliament to alter the provisions of the bill, but he should be glad for the House to understand that the bill partook somewhat of the nature of a treaty of union, every single clause of which had been debated over and over again, and had been submitted to the closest scrutiny, and, in fact, as each of them represented a compromise between the different interests involved, nothing could be more fatal to the bill than that any of these clauses, which were the subject of compromise, should be subject to such alteration ; that of course, there might be alterations which were not material, and which did not go to the essence of the measure, and he would be quite ready to consider any amendments that might be proposed in committee, but that it would be his duty to resist the alteration of anything which was in the nature of a compromise, and which, if carried, would be fatal to the measure.”

Accordingly the bill was passed as introduced, without any alteration whatever, as the British North America Act of 1867.

From the above extracts it is apparent that that Act is but the reduction into legislative form of a treaty, after the fullest deliberation previously agreed upon between the provincial statesmen who were the originators and framers of the scheme of confederation contained therein and Her Majesty's Imperial Government, and such being the history of the origin of the scheme and of the treaty of union [211] and of its embodiment in an Act of Parliament, when a question should arise which should create any doubt as to whether a particular subject of legislation comes within any of the items enumerated in sect. 92, and so under the exclusive jurisdiction of the provincial legislatures, or within sect. 91 and so under the exclusive jurisdiction of the Dominion Parliament, the doubt must be solved by endeavouring to ascertain the intention of the framers of the scheme and the parties to such treaty. From the above extracts it is also apparent that the essential feature of the scheme of confederation was that the legislative jurisdiction conferred upon

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the central and provincial legislatures respectively should be exclusive upon all subjects placed under the jurisdiction of each, save only the three subjects which were made the subjects of concurrent jurisdiction; and that such exclusive jurisdiction conferred upon the central legislature, that is to say, the Dominion Parliament, extended over all matters of a quasi national and sovereign character and over all matters of common import and general interest, which affect the general interests of the confederacy as a whole, that is to say, over all matters in which the people of the confederacy as a whole may be said to have a common interest; and that the exclusive jurisdiction of the provincial legislatures was restricted to matters of a merely private, provincial, municipal and domestic character, all of which matters are comprehended in the subjects enumerated in the several items in sect. 92 of the Act, which under the heading, "Exclusive Powers of Provincial Legislatures," declares that:

"In each Province the Legislature may exclusively make laws in relation to matters coming within the classes of subjects hereinafter enumerated."

[512] Then follow sixteen items, every one of which can with the utmost propriety be said to relate to subjects of a purely local, private, provincial, municipal and domestic character. But by sect. 91, it is declared that:

"It shall be lawful for the Queen, by and with the advice and consent of the Senate and House of Commons, to make laws for the peace, order, and good government of Canada in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the legislatures of the provinces; and for greater certainty, but not so as to restrict the generality of the foregoing terms of this section, it is hereby declared that, (notwithstanding anything in this Act), the exclusive legislative authority of the Parliament of Canada extends to all matters coming within the classes of subjects next hereinafter enumerated; that is to say."

Then follow twenty-nine items, the second of which is:

"The regulation of trade and commerce."

The section then closes with this provision:

"And any matter coming within any of the classes of subjects enumerated in this section shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration of the classes of subjects by this Act assigned exclusively to the legislatures of the provinces."

It has been sometimes, and still is by some, suggested that this provision refers grammatically only to item 16 of sect. 92, but this



is a too critical construction of the Act, for what the enactment plainly says is that any matter coming within any of the classes of subjects enumerated in sect. 91 shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration of the classes of subjects by this Act exclusively assigned to the legislatures of the provinces, thus, as I submit—and if I may be permitted the expression—explicitly implying that, as the fact in truth appears to me to be, all the matters exclusively assigned [213] to the provincial legislatures by the enumeration contained in sect. 92 were (within the intent of the framers of the scheme of confederation, and so within the meaning of the British North America Act, 1867) of a purely local and private nature; that is to say, of a purely provincial, municipal and domestic character as distinguished from matters of common import and general interest to the people of the confederacy as a whole. The true effect of this provision in sect. 91 is, plainly as it appears to me, to give expressly to the Dominion Parliament for the purpose of exclusive legislation upon all matters coming within the several subjects enumerated in sect. 91 legislative power, if required, over all the subjects enumerated in the sixteen items of sect. 92, every one of which relates to matters of a purely provincial, municipal, private or domestic character, that is to say, “of a local and private nature,” so that legislation by the Parliament upon any of the subjects comprehended within any of the items enumerated in sect. 91 may be complete and effectual notwithstanding that for such purpose interference with some or one of the subjects comprehended in the enumeration of subjects in sect. 92 should be necessary, and such interference by the Dominion Parliament with any of the subjects enumerated in sect. 92 shall not be deemed to be an encroachment upon or interference with the legislative powers conferred upon the provincial legislatures.

Now, according to the canons of construction as laid down by this Court in *City of Fredericton v. The Queen* (1) and by the Judicial Committee of the Privy Council in *Russell v. The Queen* (2), between which I do not find there is any substantial difference, if the jurisdiction to prohibit absolutely the carrying on of the trades under [214] consideration, or of any trade, whether by retail or wholesale is not comprised in some or one of the items enumerated in sect. 92 of the Act the provincial legislatures have no such jurisdiction, but the same is expressly and exclusively vested in the Dominion Par-

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(1) 3 Can. S. C. R., 505; *ante*, vol. 2, p. 27.

(2) 7 App. Cas. 829; *ante*, vol. 2, p. 12.

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liament ; and even though a particular subject of legislation may be capable of being construed to come within sect. 92, reading that section by itself, still if that subject comes within any of the items enumerated in sect. 91, it is taken out of the operation of sect. 92, which in such case is to be construed as not comprehending such subject.

Now the several questions in the case submitted to us are resolvable into this one, namely : Is jurisdiction to prohibit absolutely the manufacture in any province of the Dominion of Canada, or the importation into the province, or the sale therein either by wholesale or retail, of spirituous, fermented or other intoxicating liquors vested in the Dominion Parliament or in the legislatures of the respective provinces ? In *City of Fredericton v. The Queen* (1) this question directly arose, and the judgment of this Court therein proceeded upon two grounds : 1st, that the provincial legislature had no jurisdiction over any subject matter not coming within some or one of the classes of subjects specially enumerated in sect. 92 of the Act, and that upon principle and the authority of the judgment of the Supreme Court of the Province of New Brunswick in *Reg. v Justices of King's* (2), which judgment this Court approved of and affirmed, the subject of absolute prohibition of the sale of intoxicating liquors (such being the character and purpose of the Act then under consideration) did not come within any of the classes of subjects particularly enumerated in, and contemplated by, sect. 92 as being placed under the jurisdiction of the provincial legislatures ; [215] and, 2nd, that jurisdiction over such subject, that is to say, absolute prohibition of the trade in intoxicating liquors was expressly and exclusively conferred upon the Dominion Parliament by sect. 91, item No. 2. In *Russell v. The Queen* (3), wherein the same question arose as in *City of Fredericton v. The Queen* (1), the Judicial Committee of the Privy Council, while proceeding wholly upon the first of the above grounds, guard themselves from being considered as dissenting from the second ground, upon which this Court proceeded in *City of Fredericton v. The Queen* (1), as follows :

“ Their Lordships having come to the conclusion that the Act in question does not fall within any of the classes of subjects assigned exclusively to the provincial legislatures, it becomes unnecessary to discuss the further question whether its provisions also fall within any of the classes of subjects enumerated in sect. 91. In abstain-

(1) 3 Can. S. C. R., 505 ; *ante*,  
 vol. 2 p. 27.

(2) 2 Pugsley, 535 ; *ante*, vol. 2, p.  
 499.

(3) 7 App. Cas. 829 ; *ante*, vol. 2, p. 12.



ing from this discussion, they must not be understood as intimating any dissent from the opinion of the Chief Justice of the Supreme Court of Canada and the other judges who held that the Act, as a general regulation of the traffic in intoxicating liquors throughout the Dominion, fell within the class of subject, 'the regulation of trade and commerce,' enumerated in that section, and was, on that ground, a valid exercise of the legislative power of the Parliament of Canada."

It has, however, frequently been, and still is contended by some, but in my opinion without any sufficient grounds, that there are passages in some of the judgments of their Lordships of the Privy Council, upon the construction of the British North America Act, 1867, which tend to the conclusion that the judgment of this Court in *City of Fredericton v. The Queen* (1), cannot be sustained upon the second of the above grounds upon which this Court proceeded, namely, that the Act under consideration there being for the absolute prohibition of the trade in intoxicating liquors (although by adoption of the principle of local option) was within the exclusive jurisdiction of the Dominion Parliament, under sect. 91, item No. 2, of the British North America Act, which enacts that "notwith- [216] standing anything in this Act, the exclusive legislative authority of the Parliament of Canada extends to all matters coming within," among other items, that of "the regulation of trade and commerce."

It is true that their Lordships of the Privy Council in the *Citizens' Insurance Co. v. Parsons* (2) upon a very different subject from that of prohibition of the exercise of the trade in intoxicating liquors threw out merely the suggestion that possibly the expression "the regulation of trade and commerce" in item No. 2 of sect. 91 may have been used in some such sense as the words "regulations of trade" in the Act of Union between England and Scotland (3), and as those words in the acts of state relating to trade and commerce, but in construing expressions used in the British North America Act, 1867, we must never, as I have already observed, lose sight of the fact that those expressions are but the embodiment of the terms and provisions of the treaty prepared by the provincial statesmen assembled at Quebec by authority of Her Majesty the Queen, and concurred in by Her Majesty's Imperial Government, for the purpose of federally uniting the British North American provinces into one government, and we must always keep prominently present to

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(1) 3 Can. S. C. R., 505; *ante*, vol. 2, p. 27. (2) 7 App. Cas. 112; *ante*, vol. 1, p. 265.

(3) 6 *ANGE*, c. 11.



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our minds that the object of the framers of our constitution, in framing its terms and provisions was, as abundantly appears from the above extracted passages from their speeches, to adopt the best features of the constitution of the United States of America, the only federal constitution with which they were familiar, and to which they would naturally look for light as to what they should adopt, and what alter or reject, when engaged in the task of distributing the legislative powers between the Dominion Parliament and the legislatures of the confederated provinces. Contemplat- [217] ing, as they were the engrafting of what they considered the best features of the constitution of the United States of America upon the British Constitution, for the purpose of framing a federal constitution for the union of the British North American provinces into a confederacy under one central government, it is, to my mind, with great deference I say it, altogether inconceivable that the framers of our constitution should have had present to their minds the Act of Anne, or any act of state of the Imperial Government ; neither the one nor the other of these could be expected to throw any light upon the subject in which they were engaged, namely, the distribution of legislative powers between the central or Dominion Parliament and the legislatures of the provinces of the proposed confederacy, while, on the contrary, it was quite natural and to be expected that they should have had constantly present to their minds the constitution of the United States of America, the best features of which they desired to adopt, and to alter or reject those which did not seem to them to be desirable to be adopted. We must, therefore, I submit, be excused if we confidently affirm that in making provision for the distribution of legislative powers between the Dominion Parliament and the legislatures of the confederated provinces, and in such distribution making provision that the Dominion Parliament should have exclusive jurisdiction in all matters coming within " the regulation of trade and commerce " in item No. 2 of sect. 91, neither was the Act of Union between England and Scotland, nor any act of state of the Imperial Government relating to trade and commerce, ever present to the minds of the framers of our constitution, but that what in fact was so present was the constitution of the United States of America, the best features in which they were engaged in grafting upon the British [218] constitution for the purpose of forming a new and more perfect constitution for the proposed confederacy of the British North American provinces ; and that what they intended by the particular expression under consideration was to place " fully and unrestrictedly " (to use the language of the late Mr. George Brown, above

extracted) unlimited and exclusive jurisdiction in the Dominion Parliament over all matters of trade and commerce in every part of the Dominion, and that what they had in view in so doing was to strengthen the central Parliament, and to effect thereby an improvement in the constitution of the proposed confederacy over that of the United States of America, the central legislature of which has jurisdiction only over inter-state trade and commerce and that with foreign countries. If the framers of our constitution had contemplated conferring upon the Dominion Parliament only such a limited jurisdiction as that possessed by the Congress of the United States, they would have had no difficulty, and, doubtless, would not have failed in so expressing themselves; on the contrary, the language they have used is of a most unlimited character, and exhibits no intention of having such a limited construction. No argument in favour of such a limited construction can, I submit, be fairly drawn from the fact that jurisdiction is independently given by items 15, 18 and 19 of sect. 91 over banking, bills of exchange interest and the like, which may be said to be matters coming within the classes of subjects coming under the terms "trade and commerce" for this repetition of powers involved in the enumeration of items appears to have been inserted for greater certainty, and there is, I think, an intention sufficiently manifested on the face of the Act that the enumeration of particulars should not be construed so as to limit and restrict the operation and construction of general terms in which the particulars may be included.

Then it was contended that a passage in the judgment of the Privy Council in *Hodge v. The Queen* (1) is in favour of the contention that the jurisdiction to declare that the trades of manufacturing, and that of importing, and that of selling intoxicating liquor, shall be illegal, and shall not be carried on, is vested in the Provincial Legislatures under sect. 92. If it be, it must be, under the express terms of the Act exclusively so vested.

Now, the passage relied upon in support of this contention is that wherein their Lordships say, that the principle established by their judgment in the *Citizens' Insurance Co. v. Parsons* (2), and *Russell v. The Queen* (3) is that "subjects which in one aspect and for one purpose fall within sect. 92 may in another aspect and for another purpose fall within sect. 91." What this passage conveys simply is that a particular subject-matter may have two aspects in

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(1) 9 App. Cas. 117; *ante*, vol. 3, p. 144. (2) 7 App. Cas. 96; *ante*, vol. 1, p. 265.

(3) 7 App. Cas. 829; *ante*, vol. 2, p. 12.



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which it may be viewed, and that viewed in one of such aspects, jurisdiction over it may be exclusively vested in the Provincial Legislatures under sect. 92, and that viewed in the other of such aspects, jurisdiction over it may be exclusively vested in the Dominion Parliament, and what I understand their Lordships by that passage to say is, that for the purpose of determining whether a particular subject, having two aspects in which it may be viewed, comes under sect. 91 or sect. 92 regard must be had to the aspect in which the particular subject for the time being under consideration is to be viewed, not that a subject which according to the true construction of sect. 91 comes within one of the classes of subjects there enumerated, and which is therefore under the exclusive jurisdiction of the Dominion Parliament, by the express terms of this section, can, nevertheless, by force of sect. 92, be under the jurisdiction of Provincial Legislatures.

[220] What is the true construction of the term "the regulation of trade and "commerce," as used in sect. 91, item 2 is a matter which of course is fairly open to argument. and is to be determined, in my opinion, for the reasons already given, by ascertaining the intent of the framers of our constitution, which intent is, in my opinion, as I have above stated ; but once it is determined that a particular subject under consideration does come within that term, the jurisdiction over it is vested exclusively in the Dominion Parliament, and being so, cannot be legislated upon by a Provincial Legislature. There is no concurrent jurisdiction given to both, save only over the three subjects specially designated as subject to concurrent jurisdiction.

The subject which we have now under consideration is the right of absolutely prohibiting the carrying on of the trades of manufacturing, importing and selling spirituous liquors, the right, in fact, of declaring by legislative authority that these trades, or some or one of them, shall not be carried on ; that the carrying of them on shall be absolutely unlawful. This subject does not admit of two aspects. Between pronouncing the carrying on of a particular trade to be absolutely unlawful, and prescribing the manner in which, and the persons by whom, that trade, being lawful, shall be carried on, there is a vast difference. *City of Fredericton v. The Queen*, (1) and *Russell v. The Queen*, (2) are cases dealing with the former of such subjects, and *Hodge v. The Queen*, (3) and *Sulte v. Three Rivers* (4) are cases dealing with the latter. In *City of*

(1) 3 Can. S. C. R. 505 ; *ante*, vol. 2, p. 27.

(2) 7 App. Cas. 829 ; *ante*, vol. 2, p. 12.

(3) 9 App. Cas. 117 ; *ante*, vol. 3, p. 144.

(4) 11 Can. S. C. R. 25 ; *ante*, vol. 4, p. 305.



*Fredericton v. The Queen*, (1) and *Russell v. The Queen*, (2) the question was as to jurisdiction in the case of prohibition. In the former of those cases this court held that the Provincial Legislatures had not under sect. 92 any jurisdiction to pass the Act [221] then under consideration, the purpose of which was to legislate upon that subject; and that by force of sect. 91, item 2, the Dominion Parliament had expressly exclusive jurisdiction to pass it. In *Russell v. The Queen* (2) their Lordships of the Judicial Committee of the Privy Council, while expressing no opinion as to the applicability of sect. 91, item 2, held that there was nothing in sect. 92, conferring on the Provincial Legislatures jurisdiction to pass the Act in question, the sole purpose of which was in relation to the absolute prohibition of the trade. In *Hodge v. The Queen* (3) on the other hand they held that the Provincial Legislatures had exclusive jurisdiction over the regulation of the manner in which and the persons by whom the trade, being a lawful one, might be carried on. a subject-matter as different as it is possible to conceive from jurisdiction legislatively to declare the carrying on of the trade to be absolutely unlawful. Here, then, we have an illustration of the application of the language of their Lordships in the passage above extracted from their judgment in *Hodge v. The Queen*, (3) namely, if we regard the traffic in intoxicating liquor in the aspect of total prohibition of the carrying on of the trade, that is to say, eliminating it from the category of lawful trades, in that aspect the jurisdiction is exclusively in the Dominion Parliament; but if we regard it in the aspect of regulating the manner in which and the persons by whom the trade, being a lawful one, may be carried on in a particular province, or a particular locality of a province, that is a subject exclusively within the jurisdiction of the Provincial Legislatures. Between the judgments in these cases there is no contradiction, nor have I been able to see in any of the judgments of their Lordships of the Privy Council anything which [222] can be said to manifest judicial dissent from either of the grounds upon which the judgment of this court in *City of Fredericton v. The Queen* (1) proceeded. It seems, however, to be a matter of no importance whether the question, as to where is vested jurisdiction over total prohibition of the trade, is rested upon both of the grounds upon which this court proceeded in *City of Fredericton v. The Queen* (1) or upon the single ground upon which their

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(1) 3 Can. S. C. R. 505; *ante*, vol. 2, p. 27. (2) 7 App. Cas. 829; *ante*, vol. 2, p. 12.

(3) 9 App. Cas. 117; *ante*, vol. 3, p. 144.

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Lordships of the Privy Council proceeded in *Russell v. The Queen* (1). The report of the proceedings in the Privy Council of the case of the Liquor Licence Acts of the Dominion Parliament of 1883 and 1884, which has been laid before us as part of the present case, contains observations of their Lordships recognising the distinction which I confess, to my mind, appears very plain between the right to prohibit the carrying on of a particular trade, and so to destroy it and deprive it of lawful existence and the right to regulate the manner in which and the persons by whom the trade, being a lawfully existing one, shall be carried on.

Sir Montague Smith there in the course of the argument of counsel said :

“ The distinction, if it be one, between the Act in *Russell v. The Queen*, (1) and this Act (the Act of 1883 then under consideration) is that that (in *Russell v. The Queen*) was a prohibition Act applying to the whole of the Dominion regardless of what had been done and prohibiting the liquor traffic. I do not wish to say how it is, but the question is whether this (the Act of 1883) is not, whatever terms it may use in the preamble, really regulating in each province the local traffic ? ”

And again : “ Of course you must look at every Act and see what is the scope and object and purpose of it. This (the Act of 1883) is not really to prohibit but it is to limit.”

And again : “ The main object of the Act is not to prevent the liquor traffic but to regulate it.”

[223] And again : “ To my mind there is a distinction between the two Acts,” that is to say, between the prohibition Act under consideration in *Russell v. The Queen*, (1) and the Dominion Liquor License Act of 1883 which was but a regulating Act. The fact that the latter Act applied to the whole Dominion made no difference, for it may, I think, be said to be obvious that the Dominion Parliament never could acquire jurisdiction over a subject-matter placed by sect. 92 under the exclusive jurisdiction of the Provincial Legislatures by assuming to legislate upon such subject for the whole Dominion. So neither could a Provincial Legislature acquire jurisdiction over a subject coming within any one of the classes of subjects enumerated in sect. 91 by restricting the application of an Act of the Provincial Legislature upon such subject to the limits of the province.

But it is argued that neither in *City of Fredericton v. The Queen* (2) nor in *Russell v. The Queen* (1) was the item No. 8 of sect. 92

(1) 7 App. Cas. 829 ; *ante*, vol. 2,  
p. 12.

(2) 3 Can. S. C. R. 595 ; *ante*, vol.  
2, p. 27.



referred to or considered, and that therefore their Lordships' judgment in *Russell v. The Queen* (1) and that of this court in *City of Fredericton v. The Queen* (2) are open to review upon the question of prohibition now under consideration. From the fact that this item was not relied upon in those cases it may fairly be inferred that it never was considered by the courts or the bar to be applicable. The jurisdiction conferred by that item seems to be, that of establishing and maintaining municipal institutions. When the framers of our constitution were conferring upon the Provincial Legislatures exclusive jurisdiction to make laws in relation to "municipal institutions in the province," they had no doubt in view municipal institutions such as existed at the time of confederation, but this item No. 8, sect. 92 says nothing as to the powers [224] with which such municipal institutions may be invested; that seems to have been left to the discretion of the Provincial Legislatures to be exercised within the limits of their own jurisdiction, and would reasonably comprehend within such limits all such powers as were then possessed by such municipalities, and which were essentially necessary to the good working of such institutions, or had always been possessed by all such institutions, as for example the power of issuing licenses to the persons to be engaged in the traffic in intoxicating liquors, and the power of regulating the manner in which such persons should carry on the trade in shops, saloons, hotels or taverns, which as being matters of purely provincial, municipal and domestic character, were subject to, jurisdiction over which was intended to be exclusively vested in, the provincial legislatures; and this is what *Sulte v. Three Rivers* (3) decides, and what was intended to be conveyed by the passage from my judgment in that case which was cited by the learned counsel who argued the present case upon behalf of the province of Ontario; but a special power only then recently for the first time conferred upon municipalities in the province of Canada, and which had never been conferred upon municipalities in any of the other provinces could never be said to be a power essentially necessary to the good working of such institutions; such power therefore cannot be held to be comprehended in item 8 of that section.

In this subject is involved the particular consideration of the last of the questions submitted to us, namely, whether the 18th section of the Act of the legislature of Ontario, 53 Vict. c. 56, is,

(1) 7 App. Cas. 829; *ante*, vol. 2, p. 12.

(2) 3 Can. S. C. R. 505; *ante*, vol. 2, p. 27.

(3) 11 Can. S. C. R. 25; *ante*, vol. 4, p. 305.

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or is not, *ultra vires*. The jurisdiction assumed to be exercised by the Ontario legislature in this section is not a jurisdiction which is [225] claimed to be conferred upon provincial legislatures by anything expressed in sect. 92 of the British North America Act, but a jurisdiction which it is contended is impliedly vested in the Ontario legislature, arising from the fact that municipalities in the late Province of Canada had at the time of confederation, by virtue of special Acts of the legislature of that province, power to prohibit, by by-laws to be passed and adopted in the manner prescribed by the special Act, the sale by retail of spirituous liquors within the limits of the municipality passing such by-laws, a power which was not possessed by municipalities in the province of Nova Scotia, or in that of New Brunswick, and such Acts being repealed, it is contended that the legislature of Ontario has jurisdiction to revive their provisions. That the legislature of the late Province of Canada had jurisdiction to pass an Act in prohibition of all traffic in intoxicating liquors, or in any other article of trade, may be admitted to be unquestionable, but I apprehend it cannot admit of doubt that unless the provincial legislatures have, all of them, under their new constitution, jurisdiction to pass an Act *de novo* for the purpose of prohibiting absolutely within their respective provinces the sale of intoxicating liquors, the legislature of Ontario has no special jurisdiction to invest municipalities with such a power by passing an Act purporting to revive the provisions of an Act passed by the legislature of the late Province of Canada within its jurisdiction, and which conferred such a power upon municipalities of the said late Province of Canada. The question therefore involved in the seventh question is precisely the same as that involved in the first and subsequent questions, namely: Have provincial legislatures of the confederacy, under their new constitution, jurisdiction to make laws in prohibition of the trades of manufacturing, of importing, or of selling, spirituous liquors by wholesale or by retail?

[226] The precise history of the legislation recited in the 18th section of the Ontario Act, 53 Vict. c. 56, and upon which the legislature of the province rest the jurisdiction assumed by them in enacting the provisions of that section is as follows: The legislature of the late Province of Canada, by a special Act passed in 1864, 27 & 28 Vict. c. 18, conferred power upon the councils of municipalities to pass by-laws in prohibition of the sale of intoxicating liquors within the limits of the municipality, subject to certain conditions involving the adoption of the principle of what is called local option. The provisions of the said Act, 27 & 28 Vict. c. 18, were con-

solidated in 1866 as sect. 249, sub-sect. 9. of the Consolidated Municipal Act, viz., 29 & 30 Vict. c. 51. The whole of this sect. 249 was expressly repealed by an Act of the Ontario Legislature passed in 1869, 32 Vict. c. 32, but its terms were, either inadvertently or by design, repeated in sub-sect. 7 of sect. 6 of the latter Act. In 1874 the Legislature of Ontario passed another Act, 37 Vict. c. 32, intituled "An Act to amend and consolidate the law for the "sale of fermented and spirituous liquors," and thereby the said Act, 32 Vict. c. 32, and another Act, 32 Vict. c. 28, and also an Act, 36 Vict. c. 48, intituled "An Act to amend the Acts respecting tavern and shop licenses" were wholly repealed, and new provisions were enacted, but among such provisions there was nothing of the nature of the provisions which had been in sub-sect. 7 of sect. 6 of the repealed Act, 32 Vict. c. 32, but in lieu thereof provision was made for regulating the issue of licenses for the sale of intoxicating liquors in each municipality by an officer to be appointed by the Lieutenant-Governor, to be called "the issuer of licenses."

Now, upon and from and after the passing of this Act, the only authority, if any there was, which municipalities in the Province of [227] Ontario had, or could claim to have, to pass a by-law in prohibition of the sale of intoxicating liquors, was in virtue of the provisions of the above recited Act of the legislature of the late Province of Canada, 27 & 28 Vict. c. 18, of 1864, and of sect. 129 of the British North America Act, 1867, which enacted that: "Except as otherwise provided by this Act, all laws in force in Canada, Nova Scotia, or New Brunswick at the union . . . shall continue in Ontario, Quebec, Nova Scotia and New Brunswick respectively, as if the union had not been made: subject nevertheless (except with respect to such as are enacted by or exist under Acts of the Parliament of Great Britain, or of the Parliament of the United Kingdom of Great Britain and Ireland) to be repealed, abolished, or altered by the Parliament of Canada, or by the legislature of the respective province, according to the authority of the Parliament or of that legislature under this Act."

It being then only in virtue of this Act, 27 & 28 Vict. c. 18, that municipalities in the Province of Ontario possessed, if they possessed, the power to pass by-laws in prohibition of the sale of intoxicating liquors, such power must necessarily absolutely cease upon the repeal of that Act. But in 1878 the Dominion Parliament, regarding the prohibition of the sale of intoxicating liquors to be a subject over which exclusive jurisdiction was conferred upon the Parliament, and in exercise of the right reserved to Parliament by said sect. 129 of the British North America Act, passed

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the Canada Temperance Act of 1878, whereby, as is recited in the said 18th section of the Ontario Act, 53 Vict. c. 56, the above Act of 1864, 27 & 28 Vict. c. 18, was absolutely repealed, save as regards localities where the Act had then already been acted upon, and power is conferred by the Act of 1878 upon all electors in every municipality in every province of the Dominion qualified and competent to vote at the election of members of the House of Commons, upon certain conditions, and in adoption of the principle of [228] local option to prohibit the sale of intoxicating liquors in every municipality adopting the provisions of the Act. This Act, as an Act of prohibition, has been held by the Judicial Committee of the Privy Council in England in *Russell v. The Queen* (1), and by this Court in *City of Fredericton v. The Queen* (2), to have been within the jurisdiction of the Dominion Parliament and not to have been within the jurisdiction of a provincial legislature; the object sought to be attained by the said 18th section of the Ontario Statute, 53 Vict. c. 56, would seem to be to re-open the question adjudicated upon in those cases, and mainly upon the suggestion that item 8 of sect. 92 of the British North America Act, was not considered by the Judicial Committee of the Privy Council, or by this court in those cases. In my opinion, there is nothing in this item No. 8 of sect. 92, or in any part of the British North America Act which calls for or justifies any qualification of the language of their Lordships of the Privy Council as above cited from their judgment in *Russell v. The Queen* (1); and the principle established by that judgment is, in my opinion, that jurisdiction over the prohibition of the trade in intoxicating liquors, whether it be in the manufacture thereof, or the importation thereof, or the sale thereof either by wholesale or retail, is not vested in the provincial legislatures, but is exclusively vested in the Dominion Parliament. If the provincial legislatures have jurisdiction to prohibit absolutely the sale of intoxicating liquors, it must, I think, be admitted that they have like jurisdiction over the manufacturing, and also over the importation thereof, nay, more, as the Act gives them no more jurisdiction over the prohibition of the exercise of one trade than another, they would equally have jurisdiction [229] to prohibit the manufacture of tobacco, cigars, &c., the importation of opium, and the manufacture, importation and sale of any other article of trade, and so in fact they would have that sovereign legislative jurisdiction over every trade, and over those

(1) 7 App. Cas. 829; *ante*, vol. 2,  
 p. 12.

(2) 3 Can. S. C. R. 505; *ante*, vol.  
 2, p. 27.



general subjects in which the people of the confederacy, as a whole, are interested, and thus the main object which the authors and founders of the confederacy had in view in framing the terms and provisions of our constitution as to the distribution of legislative jurisdiction between the Dominion Parliament and the legislatures of the provinces would be defeated. In addition to the ground upon which their Lordships of the Privy Council proceeded in *Russell v. The Queen* (1), this Court held, as already observed, in *City of Fredericton v. The Queen* (2), that exclusive jurisdiction over the prohibition of the sale of spirituous liquors which was the subject matter of legislation in the Canada Temperance Act of 1878, was a subject placed expressly under the exclusive jurisdiction of the Dominion Parliament by sect. 91, item 2, of the British North America Act. That judgment has never been reversed, nor, in my opinion, shaken, and while it stands unreversed by superior authority, I consider this court to be bound by it. If ever it should be reversed, it will in my opinion, be a matter of deep regret, as defeating the plain intent of the framers of our constitution and imperilling the success of the scheme of confederation.

Upon the whole, then, in answer to the several questions submitted to us, I am, for the reasons above stated, of the opinion that upon principle—that is to say, upon the true construction of the British North America Act, 1867, apart from all authority—and upon authority, that is to say, upon the authority of the judgment of the Privy Council in *Russell v. The Queen* (1), apart from *City of Fredericton v. The Queen* (2), and upon the authority of the judgment of this court in *City of Fredericton v. The Queen* (2), apart from *Russell v. The Queen* (1), the several questions submitted to us in this case must be all answered in the negative.

SEJGWICK, J. :—

A study of sects. 91 and 92 of the British North America Act leads one to the conclusion that the following proposition may be safely adopted as a canon of construction, viz. :—

When a general subject is assigned to one legislature, whether federal or provincial, and a particular subject, forming part or carved out of that general subject, is assigned to the other legislature, the exclusive right of legislation, in respect to the particular subject, is with the latter legislature. For example, Parliament has marriage, but the legislatures have the solemnization of mar-

(1) 7 App. Cas. 829; *ante*, vol. 2, p. 12.

(2) 3 Can. S. C. R. 505; *ante*, vol. 2, p. 27.

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riage. On that subject they are paramount and supreme. So, too, the legislatures have "property and civil rights," words in themselves as wide almost as the whole field of legislation; but, parcelled out from that wide field, Parliament has a number of particular and specific subjects where it likewise is paramount and supreme. Among them is "the regulation of trade and commerce." So far Parliament has complete and exclusive jurisdiction as to that. But we have to go farther. We have to turn again to sect. 92, and we find that "shop, saloon, tavern, auctioneer, and other licenses," a subject carved out of "trade and commerce," is given to the legislatures. If the principle above enunciated is sound, then Parliament can only regulate the liquor trade or legislate in respect to it, subject to the paramount and controlling right of the local legislatures in respect to liquor licenses for [231] revenue purposes. The enumeration and assigning of the particular subject to the one body overrides and controls the other body, although charged with the general subject, and that, too, without reference to the question of subordination or co-ordination between the two bodies.

Another principle of construction in regard to the British North America Act must be stated, viz., it being in effect a constitutional agreement, or compact, or treaty, between three independent communities or commonwealths, each with its own parliamentary institutions and government, effect must, as far as possible, be given to the intention of these communities when entering into the compact, to the words used as they understood them, and to the objects they had in view when they asked the Imperial Parliament to pass the Act. In other words, it must be viewed from a Canadian standpoint. Although an Imperial Act to interpret it correctly, reference may be had to the phraseology and nomenclature of pre-confederation Canadian legislation and jurisprudence, as well as to the history of the union movement and to the condition, sentiment, and surroundings of the Canadian people at the time. In the British North America Act it was in a technical sense only that the Imperial Parliament spoke; it was there that in a real and substantial sense the Canadian people spoke, and it is to their language, as they understood it, that effect must be given.

Can a local legislature absolutely prohibit the traffic in intoxicating liquors? That is the substantial question before us. The correct solution of the problem is largely affected (although not concluded) by the meaning that is to be given to the words "the regulation of trade and commerce" in sect. 91. That these words in their plain and ordinary meaning are wide enough to include the



[232] liquor traffic is unquestioned ; the making of liquor, its sale, that is a trade or business, the dealing in it, the buying and selling of it for purposes of profit, that is commerce. But was this particular trade, the liquor business, intended to be included in the general words ? That is the question. And as I have already suggested, the true answer is to be sought not so much from the rules of statutory construction laid down in the text-books in regard to ordinary enactments, as by reference to provincial statutes and jurisprudence at the time of the union, and to the circumstances under which that union as well as its particular character took shape and form.

It was in 1864 that the Quebec convention was held. Upper and Lower Canada, Nova Scotia, New Brunswick, Prince Edward Island and Newfoundland were represented. The Quebec resolutions were passed, and these resolutions having been adopted by the three legislatures of Canada, Nova Scotia and New Brunswick formed the basis of the Union Act of 1867. The union was a federal, not a legislative union. The English-speaking provinces (considering Upper Canada as a province) were in the main in favour of a legislative union ; but Lower Canada, properly tenacious of " its language, its institutions and its laws," secured as they had been by international treaty and Imperial enactment, desired a provincial legislature in order to the perpetuity of these rights, rights which it was thought might be invaded were they to be left to the mercy of a sovereign and untrammelled legislature, the large majority of which would necessarily belong to the English-speaking race. And so the question was, a federal union or none at all. That being decided, the question of distribution of powers arose. To what powers shall the Federal Parliament succeed ; what [233] powers shall the provincial legislatures retain ? The American civil war was just closing, a conflict which, from a legal standpoint, had its origin in a dispute as to the constitution of the United States, the question of State rights ; that controversy was not to be a ground of strife in the new nation, and so, first and foremost, it was agreed that the central Parliament was to have plenary legislative authority, and that the local legislatures should have jurisdiction over such subjects alone as were expressly enumerated, and in terms assigned to them. I have said that the Lower Canadian delegates were determined to maintain their peculiar institutions by means of a local legislature ; but they were none the less desirous of giving the central authority all jurisdiction compatible with that determination, including generally those subjects that would be common to the whole Canadian people, irrespective of

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origin or religion. Now the English criminal law was the law of Lower Canada; it had become part of that law in 1764; and Lower Canada was satisfied with it. It would, therefore, be the common heritage of the new Dominion, and by common consent it was given as a subject of jurisdiction to the central Parliament.

Then, too, the Lower Canadian legislature and people had long previously adopted of their own free will the general principles of English commercial law. As early as 25 Geo. III., they had made the laws of England the rules of evidence in all commercial matters. They had adopted practically without variation the English law respecting bills of exchange and promissory notes, partnerships, the limitations of actions in commercial cases, and even the statute of frauds. In 1864 they had accepted a general law of bankruptcy, limited, however, to traders only, and had previously adopted the practice of the English courts in the trial of commercial cases. Commercial law was not in that class of "institutions and laws" which they regarded as peculiarly their own, and they were willing and anxious, seeing how the future progress and prosperity of the country would largely depend upon its trade and commerce, upon the growth, manufacture, and interchange of commodities throughout the whole Dominion, irrespective of and untrammelled by provincial boundaries or provincial enactments, that the Federal Parliament should alone legislate in respect thereto, so that as there would be a common criminal law throughout Canada there should be a common commercial law as well. And that was in fact the common aim and object of all the provinces. But how give expression to this aim? In making that clear what form of words should be used? A question not difficult of solution.

Five years previously the statute law of the then Province of Canada had been revised, consolidated, and classified in three volumes, one volume containing the statute law common to the united province, the others, the statute law applicable exclusively to Upper and Lower Canada respectively. This revision and classification, the work of the most eminent jurists in the province, became by Act of Parliament the statute law of the country, the classification having the same legal force as the statutes classified, just as if there had been a substantive enactment to the effect that thereafter in Canadian legislation the specification of a general subject in the general classification should include all the specific and particular subjects enumerated under that specification.

Reading this classification in the three volumes referred to, and comparing it with sects. 91 and 92, indubitable evidence will be

found that the compilers of the Quebec resolutions were largely aided by the work of 1859, in the selection of words by which the [235] distribution of powers was described. The language of a large proportion of the 45 enumerated subjects is substantially identical with the language of the classification in the Canadian consolidation.

Now, let us examine this classification. In the Consolidated Statutes of Canada the whole subject-matter of legislation is divided into 11 titles, of which "trade and commerce" is the 4th. Under this title are included, among other subjects, navigation, inspection laws in relation to lumber, flour, beef, ashes, fish, leather, hops, &c., weights and measures, banks, promissory notes and bills of exchange, interest, agents, limited partnerships, and pawnbrokers. In the Consolidated Statutes of Upper Canada, under "trade and commerce," are included, among other subjects, commercial law, written promises, chattel mortgages and trading and other companies. And in the Consolidated Statutes of Lower Canada under the same designation of "trade and commerce" are included the inspection of butter, the measurement and weight of coals, hay and straw, partnerships, the limitation of actions in commercial cases, and the Statute of Frauds.

Let us turn now to Nova Scotia; a few weeks before the convention in Quebec, the Nova Scotia legislature had passed the Revised Statutes of Nova Scotia (third series) divided as in the case of Canada into parts, titles and chapters. One of the titles is "of the regulation of trade in certain cases," and under it are among others, the following subjects:—Partnerships, factors and agents, bills of exchange, currency, mills and millers, regulation and inspection of merchandise and weights and measures. This classification was practically the same in the first revision in 1851, so that for at least thirteen years the expression "regulation of trade" had no uncertain meaning.

In the Revised Statutes of New Brunswick of 1854 there was [236] practically the same classification. Under "the regulation of trade in certain cases" were included statutes relating to lime, bark, flour, weights and measures, and lumber, the Interpretation Act (cap. 161 sect. 35) enacting that parts, titles, etc., should be deemed as parts of the statutes.

It will be observed that in no case is reference made to the liquor traffic under "trade and commerce" or "the regulation of trade." In the Canadian consolidation it is placed under "revenue and finance" (sub-head) "Provincial duty on tavern keepers." In the Upper Canada consolidation it is referred to in the Municipal

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Act (cap. 54, 1866), and in two ways; first under the head of "shop and tavern licenses," and secondly under the head of "prohibited sale of spirituous liquors." In the Lower Canada consolidation it is referred to under "fiscal matters." In the Nova Scotia revision under "the public revenue," the Revised Statutes of New Brunswick containing no chapter regulating the liquor traffic.

Now, we have here, I think, a clear indication of what at the time of confederation the Canadian people and legislatures understood to be included within the words "trade and commerce."

They included, unquestionably, the carrying on of particular trades or businesses, and I think commercial law generally. The actual legislation under "trade and commerce" in regard to certain staple articles of commerce, such as bread, fish, coals, etc., indicates that any other legislation in the same line respecting any other article of commerce would come under the same description, so I take it that the regulation of the liquor traffic, whether by licensing it or prohibiting it altogether, has to do with "trade and commerce."

Such being the state of the existing legislation and the view that the different legislatures had of the all-inclusiveness of the phrases [237] "trade and commerce" and "regulation of trade," what better collocation of words could be used for the purpose of making it clear that Parliament was to have exclusive jurisdiction in all matters relating to trade and relating to commerce, including the importation, manufacture and sale of all kinds of commodities, than that combination of the two phrases, the one from the seaboard, the other from the inland provinces, to be found in sect. 91, "the regulation of trade and commerce?" And the words having that meaning, having been placed there for that object, are we not bound to give them the intended effect?

I am not attempting to even criticise the correctness of the conclusion to which their Lordships of the Privy Council came in *Citizens' Insurance Co. v. Parsons* (1). I may be permitted, however, with all deference to suggest that some of the considerations to which I have referred were not presented to their Lordships when the effect of the words under review was being discussed. All I suggest is that, inasmuch as the British North America Act was an Act materially affecting, modifying, repealing pre-existing Canadian statute law, and revolutionising the constitution of the component provinces, in interpreting that Act reference may and



must be had to provincial statute law, rather than to Imperial statute law, and that where, as in the present case, the constitutional Act uses a phrase which for years had had a well defined meaning in Canadian legislation, that is the meaning which should be given to it when used in that Act.

And I have this further observation to make. The judgment referred to contains the following :—"If the words (trade and commerce) had been intended to have the full scope of which in their literal meaning they are susceptible, the specific mention of several of the other classes of subjects enumerated in sect. 91 would have been unnecessary ; as, 15, banking ; 17, weights and measures ; 18, bills of exchange and promissory notes ; 19, interest ; and even 21, bankruptcy and insolvency."

Now, circumstances existing in Canada, the then state of jurisprudence, for example, rendered it wise, if not absolutely necessary, that the classes just referred to should be specifically mentioned. The provinces had "property and civil rights" given them. In one phase or another, almost every enactment in some way affects property and civil rights ; the *raison d'être* of constituted society, the motif of the social contract, is the protection of property and civil rights. Criminal law, fiscal law, commercial law, in fact all law at some point, or in some way, touches or affects property and civil rights. Leave out several of the subjects mentioned in sect. 92, and there would have been a perpetual conflict between "property and civil rights" on the one hand, and many of the enumerated subjects of sect. 91, on the other ; so wisdom suggested *ex abundanti cautela* what was done.

Besides, in Lower Canada, there had been a long course of jurisprudence as to what constituted "a commercial matter." Some business transactions were held to be commercial matters, others not. In a dispute between an officer of the British army and his wine merchant, a promissory note given for a wine bill was held to be a non-commercial matter. So, I suppose, interest on such a note would be held to be non-commercial. Nor would the case be altered if the note were discounted at a bank. All these questions, and difficult and important many of them have been, were wisely ended, so far as the constitution was concerned, when banking, bills and notes and interest were expressly given to the Dominion. So, too, with weights and measures the duty of making by-laws, or enforcing statutes in respect to weights and measures was in some cities and provinces under municipal control. The question would be, is this subject a "matter of trade and commerce," or a municipal matter ? Its insertion in sect. 91 settled

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it. And, lastly, as to bankruptcy and insolvency. This subject was wisely inserted in sect. 91 in view of the fact already pointed out, that in Lower Canada bankruptcy legislation applied to traders only (the phrase "insolvent" being limited in its use to non-traders); and in view, too, of the further fact that in the jurisprudence of the United States, where the constitution gave "the matter of bankruptcies" to Congress, it was held that "insolvency" belonged to the State Legislatures. The insertion of both in sect. 91, settled for Canada that particular question.

I have ventured to make these observations merely with the view of inviting further consideration and investigation as to the proper functions and jurisdiction of the federal authorities in regard to "trade and commerce," and to the line of delimitation between that subject and "property and civil rights."

Assuming, however, that the prohibition of the liquor traffic is a matter of "trade and commerce," the question is not ended. "Property and civil rights" is controlled by the "regulation of trade and commerce," but is there anything in sect. 92 which controls or modifies "trade and commerce?" In my view there is much. First, there is "direct taxation within the province in order to the raising of a revenue for provincial purposes." That involves the right of taxing, even unto death, institutions incorporated under Dominion law (as was decided by the Privy Council in the *Lambe Case* (1), such institutions obtaining corporate rights in all cases excepting banks, not because of any express powers [240] given to Parliament, but either under "trade and commerce" or under its general authority to legislate in respect to "peace, order and good government," it being clear that the legislatures may incorporate such companies as are formed for provincial objects only (article 11).

Secondly, there is (article 9) "shop, saloon, tavern, auctioneer, and other licenses in order to the raising of a revenue for provincial, local, or municipal purposes."

The effect of this article is practically to give the regulation of the liquor traffic to the legislatures.

So long as such regulating legislation has as its main object the raising of revenue, it may contain all possible safeguards and restrictions as ancillary to the main object, the effect of which may be to repress drunkenness, and promote peace, order, and good government generally. If, however, a fair examination of an Act purporting to be of this kind leads inevitably to the conclusion that the object of the Legislature in passing it was not the raising of

(1) 12 App. Cas. 575; *ante*, vol. 4, p. 7.



revenue and the licensing and regulating of the traffic for that purpose, but the suppression of the traffic altogether; in other words, that it was intended to be not regulative but prohibitory. such an Act will find no support for its validity from this article. (I will presently inquire whether that support can be found elsewhere.) And, a fortiori, the legislatures cannot under this article pass an Act of absolute prohibition, for that would be in direct conflict with the expressed object for which the power was solely given. The destruction of the traffic would entail the destruction of the revenue, not the raising of it.

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Except for the decision of the Judicial Committee in *Russell v. The Queen* (1) (the Scott Act case), much might be said to favour [241] the view that the right of the legislatures to regulate the liquor traffic for revenue purposes was unlimited, and could not be taken away by virtue of anything in sect. 91, whether "peace, order and good government," or "trade and commerce," or even "the criminal law;" that the central parliament could not, by virtue of any of its powers, destroy a special power given to the local legislatures for a special and particular purpose, and that the Scott Act itself was an infringement of the provincial rights.

It might be urged that neither body could of itself, by virtue of its given powers, pass a prohibitory law, but that independent legislation on the part of both would be necessary, the Dominion passing an Act prohibiting the traffic in so far only as it had a right to prohibit it, but reserving to the provinces the fullest and freest right under article 9 to raise revenue from it, and the provinces thereupon passing legislation abrogating the license system, and surrendering their right to revenue from it.

The theory that if, under our constitution, one body cannot pass an Act upon any given subject the other necessarily can is a fallacy. A subject may be so composite in its character, may be formed of one or more elements assigned to the one legislature and of one or more elements assigned to the other, that neither one can effectually deal with the combination. For example, neither legislature could pass an Act abolishing direct taxation for municipal purposes and authorizing the raising of revenue by means of octroi, or imposts upon all goods coming in through the city gates, or an Act authorising a province to raise and collect its revenue by indirect taxation. This disability is a necessary incident of the federal system, and if it is to be got rid of, that can only be effected by abolishing the system itself.



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[242] The view which has pressed itself upon my mind is that prohibition may be a question of that character, but as it was not so held in *Russell v. The Queen* (1), and as it does not substantially affect the result of this reference, I take it for granted that the fallacy to which I have referred is not an element in the present case.

The question now arises : Is the general right of the Federal Parliament to legislate in regard to the liquor traffic, further restrained by article 8 of sect. 92, "municipal institutions in the province." In other words, can a provincial legislature, by virtue of that article, absolutely prohibit the traffic ?

At the time of the union the Province of Canada had given to municipalities in both sections the right of passing by-laws prohibiting the sale of liquor. In that province there was also then in force an Act known as the "Dunkin Act," an enactment similar in scope and object to the present Canada Temperance Act, the principle of local option being allowed to operate to its fullest extent. But neither in Nova Scotia nor New Brunswick (as I understand the facts) did local option prevail. It is true that an applicant for license had to comply with certain conditions one of them, in Nova Scotia, being that his application had to be accompanied by a petition from a fixed proportion of the ratepayers of the locality. To that extent only did local option (if that is local option) exist.

Such was then the state of the law, but some historical facts may also be mentioned as having relation to the matter. The question of prohibition had then for years been a vital political question in the Maritime Provinces ; the public mind had been in a perpetual state of turmoil about it, the ablest statesmen of the time had been in public antagonism over it ; elections had been won and lost upon [243] it. For two successive years prohibitory legislation had been introduced in the Nova Scotia Legislature, and a Bill of that character was on one occasion successfully carried through the Lower House. In New Brunswick a prohibitory law had actually passed and remained in operation for a year. It was then repealed with a reversion to license law. Such then was the attitude of the public mind in two of the three confederating provinces at the time of the union.

What meaning then is to be given to "municipal institutions in the province?" Three answers may be advanced. First, it may mean that a legislature has power to divide its territory into defined

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(1) 7 App. Cas. 829 ; *ante*, vol. 2, p. 12.

areas, constitute the inhabitants a municipal corporation, or community, give to the governing bodies or officers of such corporations or communities all such powers as are inherently incident to or essentially necessary for their existence, growth and development, and confer upon them as well all such authority and jurisdiction as it may lawfully do under any of the enumerated articles of sect. 92. That is the narrowest view. Or, secondly, it may mean that a legislature may also confer upon municipalities, in addition to these powers, all those powers that were possessed or enjoyed in common by the municipalities or municipal communities of all the confederating provinces at the time of the union, the *jus gentium* of Canadian municipal law ; or, finally, it may mean that a legislature may confer upon municipalities all those powers which in any province, or in any place in a province, any municipality at the time of the union, as a matter of fact, possessed by virtue of legislative or other authority.

And the argument in the present case is, that because at the time of the union one of the three provinces had given the right of local prohibition to municipalities it must be assumed that the [244] framers of the Act and all the provincial legislatures as well as the Imperial Parliament itself, must have intended by the use of the phrase "municipal institutions" to give to the local legislatures the right to pass prohibitory legislation, and that, too, without reference to municipalities at all. I dissent from this wide proposition. The first view, in my judgment, is the proper one, a view which gives scope for liberal interpretation as to what may constitute the essence of the municipal system, and give due effect in that direction to the municipal *jus gentium* of the three old provinces ; and I entertain the strongest doubt if it ever was contemplated by the use of the words "municipal institutions" to make any particular reference to the liquor traffic at all. The following considerations point, I think, in that direction :

(a) The question of the liquor traffic was dealt with, and I think disposed of, by article 9 in relation to licenses. In the Quebec resolutions and in the proceedings of the three assenting legislatures, the article read "Shop, saloon, tavern, auctioneer, and other licenses" only ; the limitation as to revenue was an addition made in London, with the assent of the colonial delegates there, just before the Act became law (1). The article as first framed would have had a much broader application than it has in its present shape, and possibly might have given prohibitory powers to the

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(1) See "Pope's Life of Sir John Macdonald," Appendix vol. 1.



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legislatures, and I can only suggest that the limitation was imposed for the very purpose of clearly limiting the provinces to regulation only. Besides, if the right to prohibit as well as to regulate is involved in "municipal institutions," if that phrase includes all powers previously given municipalities, including the issuing of all the licenses referred to in article 9, why particularly specify these [245] licenses in a separate article? I have always understood it to be a rule of statutory construction that where special provisions are made in regard to a particular matter and there are in the same statute general provisions broad enough apparently to cover the same matter, the special provisions govern, not the general; the particular intent prevails (1).

(b) The collocation of articles 8 and 9, and the sources from which the phraseology was probably taken point to the same conclusion; the article relating to licenses follows the one relating to municipal institutions as if the former were of the less moment. In the Municipal Act of Upper Canada (1866), at page 583, there is a sub-title "Shop and tavern licenses," and in the same section and on the same page there is another sub-title "Prohibited sale of spirituous liquors." May it not be properly suggested that this particular subject was designedly omitted?

(c) Considering that the question of prohibition was a vital social and political question (and almost as much so in 1864 as to-day), considering especially the history of the question in the lower provinces, I can scarcely bring myself to believe that it was omitted from sect. 92 by reason of "municipal institutions" containing it. If it had been intended that the provinces should have it, it would have been expressly enumerated. Regulation by means of licence was. Why omit prohibition?

(d) The jurisprudence on the question also throws light. In *Keefe v. McLennan* (2) decided in Nova Scotia in 1876, nine years after confederation, a most able judgment was delivered by the learned equity judge upon the whole question, and neither in the argument nor in the judgment was it even suggested that the [246] power claimed came under "municipal institutions." The same observation applied to *City of Fredericton v. The Queen* (3), in the Supreme Court of New Brunswick.

Why this long silence? The words "municipal institutions" were there in sect. 92, as prominent then as now, but no one in

(1) Potter's "Dwarris," 272-3: and see *London Assn. of Ship Owners v. London and India Docks Joint Committee*, 2 R. pp. 30 and 31.

(2) 2 Russell & Chesley 5; ante, vol. 2, p. 400.

(3) 3 Pugsley & Eurbidge, 139.

the maritime provinces ever dreamed that "prohibition" was concealed or wrapped up within them. Their Lordships of the Privy Council seemed of like opinion in *Russell v. The Queen* (1) decided in 1882 even although at that time *Slavin v. Orillia* (2) had been decided in the Queen's Bench of Ontario, and the question was at the argument expressly raised as stated by the present Lord Chancellor at the argument of the *McCarthy Case*. I take the reason to be that the phrase "municipal institutions," had no such broad meaning as is now contended for.

(e) But there are more weighty considerations than these. Prior to the union powers of many diverse kinds and varieties were from time to time given to municipalities. The legislatures conferring them were then supreme. There was then no possible question of jurisdiction or right of legislation; their authority was as unfettered as that of the Imperial Parliament itself. And so it happened that many municipal councils had authority to deal with matters since transferred to the central parliament, for example, weights and measures, the inspection of staple articles of commerce, the regulation and control of navigable rivers, and in the case of St. John, N.B., and of the whole of Upper Canada, of public harbours. The preparation of the electoral lists was for the most part with them. In some instances they had authority to deal with [247] the criminal law, with the violation of the dead and cruelty to animals; and so in many other cases they possessed powers in respect to subjects now transferred to parliament.

When the change came and the field of legislation was parcelled out, one portion to the Dominion and the other to the provinces, the municipalities retained all their powers, but the local legislatures did not. If before the union they had given a municipal council power to regulate a harbour, or to make a by-law respecting weights and measures, they lost the power of taking it away by virtue of the union Act, the right being transferred to Parliament alone. There can be no doubt about this; the possession by a municipality of a certain power at the time of the union affords no guide in the inquiry as to which legislature may subsequently deal with it. The only test is: Is the power referred to within the subjects of sect. 91 or of sect. 92? Regulations made by Dominion law as well as by local law must be enforced by some sort of machinery. Parliament, I think, may use existing municipal machinery for this purpose; may in respect to those subjects com-

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(1) 7 App. Cas. 829; *ante*, vol. 1, p. 12.

(2) 36 U.C.Q.B. 159; *ante*, vol. 1, p. 688.



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mitted to it, such, *e.g.*, as weights and measures, the fisheries inspection, navigation, etc., give to municipal councils power to make by laws. But, however this may be it is out of the question, it is absolutely futile to argue that because before confederation the old legislatures had given power to the municipalities to make regulations in respect to certain subjects, they still have that power, although with their consent these powers were by the constitutional Act. in so many words, taken from them and given exclusively to Parliament. It follows then that if prohibition is not an essentially component part of the subject matter described by the phrase "municipal institutions," and is "a regulation of trade and commerce," it is a matter for Parliament alone to deal with.

[248] (f) But it is argued that what is called "the police power" is possessed by the provinces under "municipal institutions," and that the right in question is a mere incident of the "police power." Now, if by "police power" is meant the right or duty of maintaining peace and order and of seeing that law, all law, whether of Imperial, Federal, or local origin, is enforced and obeyed, then I agree that that power is wholly with the provinces. But it is with them, however, not because it specially belongs to "municipal institutions," but because they are charged with the "administration of justice." The legislatures may delegate this duty to municipal functionaries, but the mode of administration is purely a matter of provincial concern.

If, however, that wide meaning is given to "the police power" which the jurisprudence of the United States has given to it, the power of limiting or curtailing without compensation the natural or acquired rights of the individual for the purpose of promoting the public benefit, the power, for instance, which enables a State Legislature to regulate the operation and tolls of a grain elevator in Chicago, or to compel a company to use interlocking switches upon its line of railway—then I say the provinces do not exclusively possess it. It is the common possession of both, to be exercised by both in their respective domains for the common weal.

(g) The cases decided in the Privy Council, in my view, practically conclude the question. *Russell v. The Queen* (1) decided that the Canada Temperance Act, a prohibitory Act, was such an Act as the Dominion Parliament might properly pass. It has been put forward, I have already suggested, that provision should have been made for the preservation of the provincial right to raise a revenue [249] by means of liquor licenses, but that judgment is conclusive

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(1) 7 App. Cas. 829; *ante*, vol. 2, p. 12.

as it decides in so many words that the Act in question "does not fall within any of the subjects assigned exclusively to the provincial legislatures."

The judgment of the Privy Council on the McCarthy Act was inevitable. That Act unquestionably was an invasion of provincial rights. Its provisions were regulative only. It purported to legislate in respect to liquor licenses and the raising of revenue therefrom, as well as to municipal regulations theretofore prescribed under provincial legislation, its practical effect, if valid, being to make invalid all local statutes then in force having reference to the liquor traffic. It purported to create the machinery, to prescribe the method by which the local authorities might raise a revenue from liquor licenses, a right unquestionably the prerogative of the provincial legislatures, and it therefore fell, destroyed by its own inherent and manifest illegality.

In the *Hodge Case* (1), the question there being :—Was the Ontario Provincial Act regulating the traffic *intra vires* of that Legislature? The decision of the Privy Council was that it was *intra vires*. When the McCarthy Act came up, a Dominion Act also purporting to *regulate* the traffic, the Privy Council as a necessary sequence, held that it was *ultra vires* of the Dominion Parliament. It is true their Lordships in the *Hodge Case* (1) intimated that the Ontario License Act came within articles 8, 15 and 16 of sect. 92, as doubtless many of its provisions in one way or another did, but I do not assume, because article 9 was omitted, that it was intended to be laid down that that article had no relation to the subject of legislation. Many of the provisions of the Act were municipal in their character, and therefore came under 8; were [250] penal in their character, and therefore under 15; merely local, and therefore under 16. But the whole Act was an Act regulating liquor and other licenses with a view of raising a revenue, and therefore under 9 as well. And there, up to the present time, so far as our ultimate appellate tribunal is concerned, and so far as the liquor traffic is concerned, the question rests.

Now, having regard to these decisions of the final appellate tribunal, I cannot help asking myself this question : Supposing the Ontario Legislature passes an Act absolutely prohibiting the sale of intoxicating liquors in the province, whether by retail or wholesale for the present purpose makes no difference, but making no exception as in the Canada Temperance Act in favour of liquors sold for sacramental, chemical, or medical purposes, and that the

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(1) 9 App. Cas. 117; *ante*, vol. 3, p. 144.



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Canada Temperance Act is in force, say, in the city of Ottawa, and suppose that a lawful sale for such purpose is made ; in that case we would have Parliament saying the sale is legal ; the Ontario Legislature saying it is not. Which is the valid legislation ? There can be but one answer to this question.

Whether the recent decision of the Privy Council in *Attorney-General of Ontario v. Attorney-General for Canada* (1) has a bearing upon the present case may be questioned. It was there decided that the Ontario Legislature having, under "property and civil rights," enacted certain provisions as to the legal consequences of a general assignment for the benefit of creditors, the same provisions that in a federal bankruptcy law as ancillary thereto might constitutionally be enacted by the federal Parliament, was within its constitutional right, but only because the federal Parliament had not taken possession of the field by dealing with the subject. Now, [251] admitting that under "municipal institutions," or "the police power," or "property and civil rights," a province may prohibit the traffic, can it now do so in view of the Canada Temperance Act ?

The federal Parliament has already seised itself of jurisdiction. It has passed the Scott Act. It has prescribed the method by which in Canada prohibition may be secured ; and is not any local enactment purporting to change that method or otherwise secure the desired end for the time being inoperative, overridden by the expression of the controlling legislative will ?

In my view the provincial legislatures do not possess the right to prohibit the liquor traffic.

Referring now to the specific questions set out in the reference, I have but few observations to make. I cannot in the absence of a specific enactment on the subject recognise any distinction, from a constitutional point of view, between the selling of liquor and its manufacture or importation. If it is admitted that a provincial legislature under "municipal institutions" has power to absolutely prohibit the selling of liquor, it must have incidentally the right of prohibiting the having of it, and as incidental to that right the right as well of making or importing it.

Neither can I, in the absence of a specific enactment on the subject, recognise any constitutional distinction between sale by wholesale and sale by retail notwithstanding the case of *Slavin v. Orillia* (2) ; that, apparently, was subsequently conceded with the full concurrence and approval of the Privy Council in the Dominion

(1) [1894] A. C. 189 ; *ante*, p. 266.

(2) 36 U. C. Q. B. 159 ; *ante*, vol. 1, p. 688.

Liquor License Act case (the case on the McCarthy Act). In the light of which particular provincial candle are we to investigate the question? In Upper Canada a sale of liquor to the extent of five gallons, or one dozen bottles, was considered a wholesale transaction, the question as to the origin of the package being of vital moment but the capacity of each bottle immaterial. In Lower Canada there was no question as to "original packages," but it was doubtless the case that a sale of three gallons or upwards was "wholesale," the character of a sale between three gallons and three half-pints being left doubtful. In Nova Scotia the line was apparently drawn at ten gallons, but inasmuch as "shop" licensees could not sell in quantities less than one gallon, and as the distinction between "wholesale" and "retail" did not there receive express statutory recognition, it is left an open question whether the constitutional line between wholesale and retail was at one gallon or ten. In New Brunswick the minimum amount that a wholesale licensee might sell was one pint. Now, in view of this diverse legislation in the several provinces—the five gallons of Ontario, the three gallons of Quebec, the ten gallons of Nova Scotia, and the pint of New Brunswick—how can this Court arbitrarily define the line or fix the limit between a wholesale and a retail transaction? how can we in the exercise of judicial office determine the delimitating boundary? The constitutional Act in my view imposes on us no such duty. It does not give colour even to the idea that the right of legislation in either body is to be determined by such questions as quantity or quality, and in my view no such distinction exists.

Neither in my view is there any distinction between those places in Canada where the Canada Temperance Act has been put in force as the phrase is and those places where it has not. The whole Act is an Act applicable to all Canada. Certain cities or municipalities may take advantage of its provisions to secure the kind of prohibition therein contemplated, but it is a law providing for prohibition everywhere. To admit the right of a legislature to enact a law for [253] the same purpose applicable only to localities that have failed to place themselves under Canadian prohibition is to make the constitutional authority of a legislature dependent on the whim or fancy for the time being of the public sentiment, a principle in support of which I can find neither authority nor reason. For the reasons stated, I think the seventh question must be answered in the negative, and in my judgment an affirmative answer can be given to none.

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KING, J. :—

Upon this continent there are two methods of dealing with the liquor traffic, viz, by license and by prohibition. The latter may be general, or exercised through what is called local option. The licensing system is one of regulation, with only so much of suppression as is incidental to regulation. Prohibition has suppression as its primary and distinct object. No one is likely to confuse the two things.

The licensing system is exclusively within provincial powers. All that is fairly incident to its effectual working goes with it as a branch of local police power. In *Hodge v. The Queen* (1) their Lordships, after summarising the clauses of the Ontario License Act then in question, say of them :—

“These seem to be all matters of a merely local nature in the province, and to be similar to, though not identical in all respects with, the powers then belonging to municipal institutions under the previously existing laws passed by the local Parliaments. Their Lordships consider that the powers intended to be conferred by the Act in question, when properly understood, are to make regulations in the nature of police or municipal regulations of a merely local character for the good government of taverns, etc., licensed for the sale of liquors by retail, and such as are calculated to preserve in the municipality peace and public decency, and repress drunkenness and disorderly and riotous conduct. As such they cannot be said to interfere with the general regulation of trade and commerce which belongs to the Dominion Parliament, and do not [254] conflict with the provisions of the Canada Temperance Act, which does not appear to have as yet been locally adopted. The subjects of legislation in the Ontario Act of 1877, sects. 4 and 5, seem to come within the heads Nos. 8, 15 and 16 of sect. 92 of British North America Statute, 1867.”

The Dominion Parliament having in 1883 passed a general licensing Act applicable to the entire country, this, with an amending Act of 1884, was held *ultra vires* upon a reference of the subject to the Judicial Committee of the Privy Council.

Then, with regard to prohibition, the Canada Temperance Act (2) is a local option prohibitory Act. It gives to each county and city throughout the country (or electoral division in Manitoba) the right of determining, by a vote of the parliamentary electors therein, whether or not the prohibitory clauses of the Act shall be

(1) 9 App. Cas. 117, 131; *ante*, (2) R. S. C. c. 106.  
vol. 3, pp. 144, 160.

adopted. These clauses prohibit (with some exceptions not material to be now stated) the sale of intoxicating liquors entirely. When locally adopted they continue in operation for three years, and thereafter until withdrawn upon like vote. On the other hand, a vote adverse to local option bars the subject for a like period. In *City of Fredericton v. The Queen* (1) the Act was held valid, chiefly as relating to the subject of trade and commerce. In *Russell v. The Queen* (2) it was sustained on other grounds. Their Lordships, approaching the subject from the side of provincial powers, held that the provisions of the Act did not fall within any of the classes of subjects assigned exclusively to the provincial legislatures. It was therefore, in their opinion, at least within the general, unenumerated and residual powers of the general parliament to make laws for the peace, order and good government of Canada in relation to all matters not coming within the classes of subjects assigned exclusively to the provincial legislatures.

[255] "It was not doubted," say their Lordships in *Hodge v. The Queen* (3), referring to their decision in *Russell v. The Queen* (2) "that the Dominion Parliament had such authority under sect. 91 unless the subject fell within some one or more of the classes of subjects which by sect. 92 were assigned exclusively to the legislatures of the provinces."

Referring to the grounds of decision in *City of Fredericton v. The Queen* (1), their Lordships (who had shortly before in *Citizens' Insurance Co. v. Parsons* (4) referred to the words "trade and commerce" in a way that is sometimes sought to be put in opposition to the views of this court in *City of Fredericton v. The Queen* (1), say "they must not be understood as intimating any dissent from the opinion of the Chief Justice of the Supreme Court of Canada and the other Judges who held that the Act . . . fell within the class of subject, 'the regulation of trade and commerce' enumerated in that section [91]."

In treating of the exclusive powers of the provincial legislatures, clause 8 of sect. 92 respecting municipal institutions was not in terms referred to in *Russell v. The Queen* (2), and this fact has sometimes been made use of in the way of criticism of that case. Indeed, in the argument of the Dominion License Act, one of their Lordships expressed the opinion that clause 8 of sect. 92 had not been argued in *Russell v. The Queen* (2), but the counsel then arguing (the present Lord Chancellor) stated that it appeared from

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(1) 3 Can. S. C. R. 505; *ante*, vol. 2, p. 27.

(2) 7 App. Cas. 829; *ante*, vol. 2, p. 12.

(3) 9 App. Cas. 117; *ante*, vol. 3, p. 144.

(4) 7 App. Cas. 96; *ante*, vol. 1, p. 265.



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a shorthand note of the argument that the point had been distinctly urged. When *City of Fredericton v. The Queen* (1), which is known to be substantially the same case, was before this court the point was argued. Mr. Lash, Q.C., one of the counsel for the Act, thus alludes to the argument as adduced by the other side (2): "It is also contended that this law, having for its object the suppression [256] of drunkenness, is a police regulation, and so within the powers of municipalities," etc. In *Reg. v. Justices of King's* (3) Chief Justice Ritchie had previously dealt with the like contention, and in *City of Fredericton v. The Queen* (1) adhered to that decision. To that case I beg to refer.

But what is more pertinent is the fact that, after clause 8 of sect. 92 had been fully considered and given effect to in *Hodge v. The Queen* (4), their Lordships, as though it might be thought to make a difference with *Russell v. The Queen* (5), took occasion to re-affirm that decision: "We do not intend to vary or depart from the reasons expressed for our judgment in that case."

Now, it is important to note that the substantial thing effected by the Canada Temperance Act is the suppression of the liquor trade in the municipalities severally by a separate vote of each. What is effected is local prohibition in all its local aspects. It could not have been really meant by their Lordships that this was outside of the classes of subjects by sect. 92 assigned to the provincial legislatures, simply by reason of the Act having operation as a local option Act throughout Canada, while a provincial Act is necessarily limited to the province. That would indeed have been a short road to a conclusion, but it would have confused the boundaries of every subject of legislation, besides rendering unnecessary the particular provisions of the British North America Act (6), respecting concurrent legislation on certain specified subjects. This was recognised in the decision upon the Dominion License Act, where it was held that where a subject, such as the licensing system, is within a class of subjects assigned exclusively to the pro-[257] vinces, the Dominion does not, by legislative provisions respecting it applicable to the entire Dominion, draw it at all within their proper sphere of legislation.

But it is argued that prohibition may in one aspect and for one purpose fall within sect. 91, and for another purpose and in another aspect fall within sect. 92. And inasmuch as it is not possible by general words to enter into the complexities of transactions and

(1) 3 Can. S. C. R. 505; *ante*, vol. , p. 27.

(2) 3 Can. S. C. R., p. 510.

(3) 2 Pugsley, 535; *ante*, vol. 2, p. 499.

(4) 9 App. Cas. 117; *ante*, vol. 3, p. 144.

(5) 7 App. Cas. 829; *ante*, vol. 2, p. 12.

(6) Sect 95.

distinguish entirely one subject from another in all its relations, the cases clearly establish that legislative provisions may be within one or other of these sections, according as in one aspect or another they may be incidental to the effectual exercise of the defined powers of parliament or legislature. In the effectual exercise of an enumerated power it may be reasonably necessary to deal with a matter which, apart from its connection with such subject, would appear to fall within a class of subjects within the exclusive authority of the other legislature, and in such case there is the ancillary power of dealing with such subject for such purpose, as explained and illustrated in *Attorney-General of Ontario v. Attorney-General for Canada* (1). In the application of this principle the Dominion legislation overrides, where the same subject is dealt with through ancillary powers; and, pending the existence of Dominion legislation, the provincial legislation, if previously passed, is in abeyance; if subsequently passed, it is ultra vires. In all such cases regard is to be had to the primary purpose and object of the legislation, and (except in the few cases where concurrent legislation is authorized, of which this is not one), the primary object is to be attained through one of the legislative authorities, and not indifferently through either.

[258] Now, prohibitory Acts are very single in their aim. Those who favour them may be influenced by variant motives, although probably these vary but little; but the direct, well understood and plain purpose is the suppression of the liquor trade. This is accustomed to be effected, not incidentally in the effectual carrying out of some larger project of legislation, or as ancillary to something else, but as a principal political object in itself.

If this power exists in the provinces, it must be found either in the enumerations of sect. 92, or in what is reasonably and practically necessary for the efficient exercise of such enumerated powers (subject to the provisions of sect. 91), otherwise it can in no aspect be within the sphere of provincial legislation.

The power in question is not an enumerated one. On the contrary, what indirect reference there is to the liquor traffic is made in connection with the license system; and licensing does not import suppression, except, at most, as incidental and subordinate to it.

Then, is the power to prohibit reasonably or practically necessary to the efficient exercise by the province of an enumerated power? It is urged that this is so with regard to clause 8, respecting muni-

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cial institutions. The licensing system is ordinarily associated with that subject, and licensing is also pointed at in clause 9 ; but there is no inherent or ordinary association of prohibition with municipal institutions. Neither in England nor the United States is this so. The state of things in the confederating provinces at the time of union will be referred to hereafter. What is reasonably incidental to the exercise of general powers is often a practical question, more or less dependent upon considerations of expediency. The several judgments of the Privy Council have placed the respective powers of the Dominion and provinces upon the subject on a wise and practical working basis ; affirming, on the one hand, the exclusive right of the provinces to deal with license and kindred subjects, and affirming, on the other, the right of the Dominion to prohibit, either directly or through the method of endowing the several provincial municipalities with a faculty of accepting prohibition or retaining license. Wherein is it reasonably necessary for purposes of municipal institutions that the provinces should have like power of suppression, to be exercised either directly upon the entire province or through the bestowment of a like faculty upon the municipalities ? Why (in any proper constitution) should a considerable trade be subjected to prohibition emanating from different legislative authorities in the one country ? The suppression of a lawful trade impairs the value of the power to raise revenue by indirect taxation. Prima facie, the power that levies indirect taxation has the power to protect trade from suppression, and the sole power of suppression. And in a system of government where the provinces receive annual subsidies out of the Dominion treasury, it seems repugnant that the provinces should, through mere implications respecting municipal institutions, possess the power to destroy a large revenue-bearing trade. It is for the Dominion to determine for itself whether or not such a trade shall be suppressed, and if so how and to what extent. The Dominion has so expressed itself. It has entered every municipality and offered to it the suppression within it of the liquor trade under sanctions of Dominion law.

It is further contended, however, that prohibition is local and municipal, because that, at the time of the union, two out of the three original members of the union (having then, of course, full power of legislation) had conferred upon the municipalities a local [260] option of prohibition (within wider or narrower limits), and had incorporated this provision in the municipal Acts. Even had this been general with all the provinces, I do not think that the conclusion drawn from it is warranted, in view of the whole of the British North America Act ; nor, perhaps, would it support the

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claim to deal with the matter otherwise than through the like method of municipal local option. But, assuming that a common understanding of words in an unusual sense might be inferred from such a state of things, if it had been general, the fact that in one of the confederating provinces (New Brunswick) there was no such provision, deprives the argument of the weight that only an entire consensus could give to it. In New Brunswick there were at the union two groups of municipal institutions, the representative kind (as in Upper and Lower Canada), throughout part of the province, and the system of local government of counties through the justices in session (as in Nova Scotia), throughout the remaining part. But in neither kind was there vested the power of suppressing the liquor trade. The Act in force in New Brunswick was 17 Vict. c. 15, as from time to time revived and continued (1). This is important, for temperance legislation had gone further in New Brunswick than in any other province. In 1855 an Act was passed (2) prohibiting throughout the province the importation, manufacture and traffic in intoxicating liquors. This was repealed in 1856 (3), amid great political excitement, and the absence of local option at the time of the union was not a casual omission. Notwithstanding the great weight of judicial authority the other way, I cannot, in view of this, give to the words "municipal institutions," as used in the British North America Act, a meaning not [261] inherent in them, simply because of this extension of power to the municipalities in several, but not all, of the confederating provinces. It seems to me that the contention in question comes to this, that the words "municipal institutions" are to be read not only as meaning everything inherent in or ordinarily associated with them, but also all other powers exercised by the municipalities of any of the confederating provinces. I must add that, even if the practice had been general, such an excrescence on the municipal system would be removed by the other provisions of the British North America Act.

Assuming, however, that there is such a right in the provinces, and that, in some respects, prohibitory legislation is within their powers, I agree with Mr. Nesbitt (who was permitted to address us on behalf of the Brewers' Association), that no such legislation could have validity while the Canada Temperance Act is in force. The provisions of that Act giving the option are in force throughout the entire country. The option is exercisable everywhere and at any time, and these options (with such other law as is in force)

(1) 20 Vict. c. 1 [1856]; 33 Vict.  
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(2) 18 Vict. c. 36.

(3) 20 Vict. c. 1.



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represent what Parliament deemed adequate upon the subject. Why then should there be competing local options established under provincial legislation, or a competing system of provincial prohibition?

The Dominion Parliament, in passing the Act, declared an intention to enact a uniform law upon the subject. It assumes the right to prohibit, and fixes the conditions. The freedom of the trade (subject to license and any other unrepealed law), if the conditions are not met, is correlative with its suppression if they are. Mr. Nesbitt has well stated the confusion in the working out of the Canada Temperance Act that would follow upon absolute prohibition by the province, or prohibition through different local options. The result would be very far from uniformity.

[262] As to a distinction between prohibition of the retail trade and that of the wholesale trade, it is a difference of degree and not of kind. The wholesale trade could not long survive the extinction of the retail business throughout a province. The matter has to be looked at broadly, without too much refinement or distinction.

As to the power to prohibit importation, that manifestly and directly affects "trade and commerce" and the power of raising revenue by customs duties. As to the suppression of the manufacture of liquor, this contention interferes with excise and subjects the argument respecting the implied powers of municipal institutions to a great strain.

The question regarding the Ontario Act of 1890 remains. It has already been incidentally considered. No doubt much latitude ought to be given to the exercise of the licensing power, in the way of restriction or regulation. Prevention of selling in certain ways, at certain times or places, to certain persons, etc., etc., is greatly removed from prohibition proper. But, as I read it, the Act appears to go beyond license and regulation or restriction. It seems substantially to give the power to prohibit altogether. It is true that the Act is expressed to be merely the revival of provisions in force at the Union, and since assumed to be repealed by the provincial legislature. But, if the power to pass the Act as a new provision of law does not exist, no more does the power to revive the old law, which, on the other hand, needs no revival so far as Ontario legislation is concerned, inasmuch as it was never effectually repealed by such legislation.

I therefore answer each of the questions submitted in the negative, with deep acknowledgments to the learned counsel who have been heard on behalf of the several interests before the Court.

JUDGMENTS IN ONTARIO COURT OF APPEAL, IN RE LOCAL  
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[Reported 18 App. Rep. 572.]

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HAGARTY, C. J. O.:—

— (The learned Chief Justice read the questions (1) and continued):  
From an early period, at least as far back as 12 Vict. c. 81 (1849), municipalities had the power to regulate tavern licenses and to limit their number.

In 1853, by 16 Vict. c. 184, sect. 3, sub-s. 2, they were given power to pass by-laws "for preventing absolutely the sale of wine, brandy or other spirituous liquors, ale or beer or any of them, by retail within the municipality," with a saving clause as to sale in original packages containing not less than five gallons.

[578] In 1858, 22 Vict. c. 99, sect. 245, sub-s. 6, there is a clause, identical with that re-enacted in the statute on which our opinion is sought, for prohibition subject to the approval of the electors.

This is repeated in C. S. U. C. c. 54, sect. 246 (1859), authorizing the prohibition of sale by retail. Then 23 Vict. c. 53 (1860), limited the number of licenses to be granted in municipalities, sect. 5 declaring that it was not to restrict municipal councils from further limiting the number or passing any other by-law under sect. 246 of C. S. U. C. c. 54.

In 1864 the Legislature passed the Act 27-28 Vict. c. 18 (commonly called the Dunkin Act). Sect. 1 provided that the municipi-

(1) [This case came before the Court on certain questions referred by the Lieutenant - Governor in Council pursuant to the Ontario Act 53 Vict. c. 13. The questions so referred were the following :

1. Had the Legislature of Ontario jurisdiction to enact the 18th section of the Act passed in the 53rd year of Her Majesty's reign, chaptered 56, and entitled, "An Act to Improve the Liquor License Laws"?

2. Or had the Legislature jurisdiction to enact the said section as explained by section 1 of 54 Victoria, chapter 46?

3. Has the council of a township, city, town and incorporated village

authority to pass by-laws for prohibiting the sale of liquors in the original packages in which the same have been received from the importer or manufacturer; provided that the by-law before the final passing thereof has been duly approved by the electors of the municipality in the manner provided by the sections in that behalf of the Municipal Act?

4 Is a by-law in terms of section 18 of 53 Victoria, chapter 56, or as explained by section 1 of 54 Victoria, chapter 46, invalid, where the by-law does not provide a fine or penalty for sales contrary to its provisions?]



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pal council of every county, city, town, township, etc., should have power to pass a by-law for prohibiting the sale of liquor and the issuing of licenses within such county, etc., and full provision was made as to its being approved by the electors. Sect. 2, sub-s. 3, allowed distillers and brewers to sell in not less than certain named quantities. The brewers and distillers' clause still appears in R. S. O. (1887) c. 194.

In 1866, in 29-30 Vict. c. 51, sect. 249, sub-s. 9, is the clause allowing a by-law for prohibiting the sale in taverns by retail, and for prohibiting totally the sale thereof in places other than houses of public entertainment, and this clause is identical with the clause now in question. Sect. 252 declares that no license shall be necessary for selling liquor in original packages.

Confederation took place on the first of July, 1867.

The first Ontario legislation seems to be 1869, 32 Vict. c. 32; "The Tavern and Shop Licenses Act." Sect. 6 empowers municipalities to pass by-laws in terms identical with the clause in question. See sub-s. 7.

Sect. 40 repeals the sects. 249 to 263 of the Act of Canada of 1866, cited above. This sect. 249 is that allowing such a by-law before confederation, and thus the same statute repealing the clause re-enacts it in the same terms.

So things remained under the last Act from 1869 to 1874.

[579] In 1874, 37 Vict. c. 32, amended and consolidated another Act, not bearing on this point, and the prohibition clause was omitted in declaring the powers (section 9) of municipalities in counties where the Temperance Act of 1864 was not in force, leaving however the power to regulate and to define the conditions and qualifications requisite for obtaining licenses and the power to limit the number. And see 40 Vict. c. 18 (O.), and R. S. O. (1877), c. 182.

53 Vict. c. 56 is an Act amending the Liquor License Laws. Sect. 18 is as follows:

(The learned Chief Justice read the section (1) and continued):

We must notice the Canada Temperance Act of 1878, a Dominion Act whose validity has been affirmed in the Privy Council, 41 Vict. c. 16.

It takes up the general principle of the Canada Act of 1864 (called the Dunkin Act). It extends over the Dominion, and provides an elaborate set of provisions for taking the votes of county

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(1) [See this section, *ante*, p. 297.]

and city electors on the proposed prohibition by-law, and provides for the repeal in certain cases of similar by-laws, under the Act of 1864.

It contains most stringent provisions against the sale or barter of every intoxicating liquor.

Sect. 99, sub-s. 2, provides that no license to distillers or brewers, nor to any steamboat or vessel, nor any other license shall avail against any violation.

Sub-sect. 3 provides for its use for sacramental or medicinal purposes. Sub-sect. 5 provides that any cider producer or licensed distiller or brewer in a prohibition county or city may sell at his premises, not under specified quantities, only to druggists or others licensed or to persons who he has reason to believe will forthwith carry the same beyond the limits of the prohibition district. By sub-sect. 6 leave is given to companies making native wine to sell it in certain quantities.

By sub-sect. 7 manufacturers of native wine when authorized so [580] to do by license from the municipal council or other authority having jurisdiction where the manufacturing is carried on may sell the same in named quantities.

By sub-sect. 8 a merchant or trader exclusively in wholesale trade, when duly licensed to sell liquor by wholesale, may sell in named quantities to druggists or to persons who as he believes will forthwith carry the same out of the county, etc., etc.

It is clear that no license can avail against any violation of the Act except within the allowed limits.

The Act contemplates the issuing of licenses to brewers and distillers and manufacturers of native wine.

For at least thirteen years prior to confederation municipalities had this power of prohibiting the sale of liquor. The power existed at confederation and was continued by Ontario legislation in the Liquor License Act down to 1874. The Dominion Act then interposed.

Now the Ontario Legislature revives the dropped clause.

Under the confederation Act "Municipal Institutions in the Province" are in the class of subjects within exclusive provincial regulation.

It may be safely said that there is no apparent intention in the confederation Act to curtail or interfere with the existing general powers of municipal councils, unless the Act plainly transfers any of such existing powers to the Dominion jurisdiction.

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Where either the Legislature of Canada before, or the Dominion Parliament after, confederation provided enactments as to prohibition inconsistent with the municipal regulations, the latter must give way.

When either under the Act of 1864 or of 1878, a county passed a prohibition Act the powers of a township so to do would be at least in abeyance.

I read the clause 18 restoring the old powers to the municipality to apply only to places where neither of these Acts is in force, and to apply only so long as the Dominion Act shall not be applied to it.

The Local Legislature specially disclaim any exercise of jurisdiction beyond the revival of provisions in force at confederation.

[581] As I understand the various interpretations given to the confederation Act in its distribution of legislative powers, in the Privy Council and in the Supreme Court, and without attempting to cite from the voluminous authorities on the subject, I arrive at the conclusion that the Legislature of Ontario had jurisdiction to pass the 18th section.

The effect is to leave the power of prohibition in the municipalities as it was for so many years before and at the time of the Imperial settlement of the constitution of our Dominion.

I do not overlook the question raised as to this being an alleged interference with "trade and commerce:" See *Russell v. The Queen* (1). The opinion of the Supreme Court in that case, that a general law like the Canada Temperance Act, came within the exclusive power of the Parliament of Canada, is thus noticed, the Privy Council declaring that "they must not be understood as intimating any dissent from the opinion of the Chief Justice of the Supreme Court of Canada and the other Judges who held that the Act, as a general regulation of the traffic in intoxicating liquors throughout the Dominion, fell within the class of subject 'the regulation of trade and commerce' enumerated in that section, [91] and was, on that ground, a valid exercise of the legislative power of the Parliament of Canada."

The Privy Council decided the case on other grounds.

I am wholly unable to see how the power granted to township municipalities to prohibit the retail sale of liquor by any reasonable construction comes within the words "trade and commerce" as used in the federation Act. The power, as already pointed out, had been for many years vested in the townships. If such a construction prevail it would seem to me to interfere most extensively with

many powers granted by our municipal Acts. They are full of provisions not only for licensing but for regulating, governing, and in many cases preventing acts locally affecting trade and commerce in the locality, such as : auction sales of goods ; hawkers and ped-[582]dlers ; regulating ferries ; for preventing exhibitions held or kept for hire or profit ; bowling alleys, and other places of amusement ; limiting the number of victualling houses ; regulation of markets and the sale of certain goods therein, and on the streets—most extensively interfering with the rights of sale and trading in cities and towns ; for regulating and preventing various manufactories ; preventing dangerous trades ; forestalling and regrating, etc., etc.

All these powers existed at confederation, and I am of opinion that there can be no interference with such power by any fair interpretation of the words “ trade and commerce.”

I arrive at these conclusions in my view of this prohibitory clause. I read it as it stands in the Act of 1868, and in connection with the rest of that Act, and especially with the 252nd section.

Although it uses the words “ prohibiting totally the sale thereof,” I think these words must refer to the preceding words which deal with the selling by retail, and merely prohibit such selling in every place.

The subject of the legislation in the Act was the granting of shop and tavern licenses, for limiting their number, etc., and councils are allowed to prohibit the sale by retail in inns or houses of entertainment, and wholly to prohibit the sale thereof in shops and places other than houses of public entertainment. I read this as necessarily confined to the retail trade, which is the subject dealt with, and for which a license is required.

Then when sect. 252 declared the general law to be that no license should be required to sell in packages of not less than five gallons, it could not I think be intended that such rights should be destroyed under the wording of the prohibitory clause, or in other words, that such clause extended to the sale of liquors in manufactories within the municipality in the specified larger quantities. I think the general wording of the Act and its general clauses clearly indicate that this prohibitory clause is dealing solely with the retail [583] business. The practice of “ drinking,” as generally understood in the country, is aimed at, whether it may occur in tavern, shop or any place.

I think it to be a strained and unnecessary construction to apply it to all the dealings of brewers and distillers in the sale of their

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goods in the ordinary course of their business. If they sell in the style of the tavern-keepers in the retail drinking business they bring themselves within the by-law.

The late Sir William Richards, in his judgment in *Slavin v. Orillia* (1), clearly recognises the meaning of the section to be confined to the retail business.

So construed it can hardly be said to infringe on the subject of "trade and commerce" which belongs to the Dominion authority.

The following question has also been submitted for our opinion. → [The learned Chief Justice read the third question and continued]:

I cannot but regret that it should be thought proper to submit such a question to this Court.

It is not a question as to any course or action taken or to be taken by the Executive Government, but it refers wholly to the course to be adopted by the municipal authorities in the introduction and passing of their by-laws.

It is in effect the same as asking a definition of the powers of assignees in insolvency, or of sheriffs, registrars, or of railway or other companies chartered by the province.

I think, with much respect, that a perusal of the Act of 1890, c. 53, would not lead ordinary minds to the opinion that although the letter authorizes the submission of "any matters which he (the Lieutenant-Governor) thinks fit to refer," it would be reasonable to expect this application of the general language to questions, not as to the validity of acts of the legislature or the executive, but as to the acts of municipal or trading corporations or of any class of officials.

[584] The legislature in the late Act, 54 Vict. c. 46, disclaims all interference with the 252nd section of the Municipal Act, 29-30 Vict. c. 51, passed by Canada, as to tavern or shop licenses being required for the sale of liquors in the original packages of not less than five gallons or one dozen bottles, save in so far as modified by sub-sect. 9 of sect. 249, being the section as to by-laws for prohibition. No notice is taken of the repeal by the Local Legislature of this 252nd clause and a large number of others by the statute 32 Vict. c. 32.

This leaves it, as I understand, conceded that the brewers and distillers' clause remains still the law of the land. If so, I consider that they may sell the quantities mentioned in the original packages; in other words, that the municipality cannot interfere with their action. After so selling it would then seem to follow that the purchaser could not retail the contents or sell after bulk broken.

But the words of the section 252 go further and appear to authorize a sale of the original packages as received from the manufacturers, that is, the distillers. If this section be held to govern it will have this construction.

I think the intention of the legislatures, both federal and provincial, has been throughout to preserve the trade interests of brewers and distillers as distinct from the retail dealers.

I therefore answer the third question in the negative.

As to the fourth question, I answer it in the negative. I do not consider that a by-law omitting to provide a penalty is necessarily bad. It may be ineffective, but I do not think any court would quash it on any such ground. Besides there might be some general law in existence providing for penalties under all by-laws.

BURTON, J. A. :—

This is a somewhat novel proceeding, under a recent Act of Parliament, not unprecedented to a limited extent even in England, but rendered more necessary here in consequence of the great [585] variety of constitutional questions which are constantly arising under our federal system, and the injustice of subjecting individual litigants to the delay and expense of having them decided in the particular suits in which they are interested ; and if confined to important questions it would seem to be a very salutary piece of legislation.

The questions raised here are in my opinion of that character.

There has been at various times a great diversity of opinion upon them, and that probably still exists to a considerable extent. These questions have been already stated by the learned Chief Justice, and I need not repeat them.

The argument took a much wider range than would appear to be strictly requisite for a determination of the questions submitted, and the learned Chief Justice has quoted very largely from the statutes previous to confederation, for the purpose of showing that the right to prohibit was vested in the municipal bodies at that time, and much of the argument was based upon that fact. I have also travelled over more ground than is strictly necessary, believing that I can thereby make my conclusions, and my reasons for those conclusions, more clear and distinct.

It does not suggest itself to my mind as at all conclusive in favour of the power of the Local Legislature to deal with the subject of prohibition under the words "municipal institutions," that provisions in reference to that subject were, at the time of the passing of the confederation Act, to be found in our own Municipal Acts, and had been so for many years.

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It must not be forgotten that the legislature of the old Province of Canada which passed those Acts had plenary powers of legislation, including the power to regulate trade and commerce, to deal with the criminal law, and in fact all the powers which are now distributed between the Parliament of the Dominion, and the legislatures of the provinces.

[586] Having that power it was clearly competent to the legislature to confide to a municipal council or any other body of its own creation, or to individuals of its selection, authority to make by-laws or resolutions as to subjects specified in the enactment, with the object of carrying it into effect ; and the provision in question being found therefore with a Municipal Act in one of the provinces furnishes no conclusive evidence that by the words "municipal institutions" it was intended to confer every power which might be contained in such an Act upon the legislatures of the provinces.

It is proper to enquire therefore what was the extent of the grant given under that designation.

Does it mean only the creation and erection of municipalities with such powers as are of the essence of municipal institutions, and necessarily incident to and essential to their existence, or does it include the powers and functions which, at the time of confederation, were ordinarily exercised to a greater or less extent by the municipalities of all the provinces ?

It may not without some reason be contended that there is no inherent connection between the liquor traffic and municipal institutions, which is perfectly true, but there was, if I may so express myself, a constitutional connection. In, I believe, all the provinces the power to regulate, by the granting licenses to sell, intoxicating liquors existed ; whilst in many the power to regulate even to the extent of prohibiting it altogether existed as a matter of police or municipal regulation, so that we have to regard it in the view that at that time the regulation and prohibition had come to be regarded as municipal regulations which were guaranteed to the provinces under confederation, and made part of their rights by sect. 92.

I come therefore individually to the conclusion, although this point has not as yet been passed upon by the Judicial Committee, that under the term "municipal institutions" the Local Legislatures' power to prohibit was included ; and if the power the exclusive power to deal with this question.

[587] Being then a matter of that kind, and one of a merely local nature, that is to say, confined to the Province, the onus is on those who contend that it is ultra vires to show that it comes within the powers granted to the Dominion in the 91st section.

The ratio decidendi in *Russell v. The Queen* (1) in the Privy Council proceeded, as I understand it, upon this principle :

The Judicial Committee there held that the case fell, prima facie, within sect. 91 under the general power (in addition to the enumerated powers) to make laws for the peace, order and good government of Canada, and it became necessary, therefore, to ascertain whether it also fell within the enumerated classes of subjects in sect. 92 assigned exclusively to the provincial legislatures.

It appears upon the face of the judgment that there were only three classes of subjects under which the appellants' counsel contended that the case came under sect. 92, viz. :

1. Shop and tavern licenses for the raising of a revenue.
2. Property and civil rights in the Province.
3. Matters of a local and private nature within the Province.

It is perfectly clear that it did not fall within any of these.

I have gone to the trouble of obtaining the factum or case presented to the Judicial Committee in that appeal, and find that no reliance was placed on sub-sect. 8, but it was mainly argued that the power of the Province to deal with the question was derived from sub-sect. 9, and Sir Richard Couch in commenting upon it in a subsequent case says : "I do not recollect sect. 8 being relied on. I think all the clauses that were relied upon in the argument are noticed in the judgment."

It is perhaps not a matter of surprise that sub-sect. 8 was not quoted in the factum when we recall the fact that the case arose in the Province of New Brunswick where the municipal powers [588] conferred by the legislature appear to have been of a more restricted nature than in some of the other provinces, and not to have expressly authorized prohibition, and it may have been supposed that the municipality had only power to regulate in a particular way. Be that as it may, the Privy Council do not appear to have had their attention drawn to it.

It is sometimes said that although this sub-sect. 8 was not called to the attention of the Judicial Committee in *Russell v. The Queen*, (1) that that case was reconsidered and affirmed in *Hodge v. The Queen*, (2), but the same remark applies to that decision. The Judicial Committee were not in that case considering, nor would their attention be drawn to that sub-section nor to 29-30 Vict. c. 51, sect. 249, sub-sect. 9. The question there arose under the provisions of the Ontario Liquor License Act of 1877, which dealt with a totally different matter. I consider it as a mere affirmance

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(1) 7 App. Cas. 829; *ante*, vol. 2, p. 12.

(2) 9 App. Cas. 117; *ante*, vol. 3, p. 144.



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of the principle of decision laid down not only in *Russell v. The Queen* (1), but in a number of other cases, and I venture very humbly to submit that if this sub-sect. 8 had been brought to their Lordships' attention and they had placed the same interpretation upon it which I have done, it would have followed as of course that for the reasons given in that judgment that decision would have been different.

And now, I wish to notice a point upon which I think a good deal of misconception has existed. It has never been suggested in the Judicial Committee (although I have seen some such opinion expressed in other quarters), that in any case which comes under the residuary legislation of the Dominion, that legislation can in any sense override a subject which comes under the specific enumeration contained in sect. 92.

Thus *prima facie* in the *Russell Case* (1) under the words "peace, order and good government" of Canada the power would exist to pass a prohibitory liquor law, but whenever you find in sect. 92 "municipal institutions," interpreted as we are interpreting them, the right of the Dominion to legislate upon the subject is dis-[589] placed; otherwise, as remarked by Mr. Justice Strong, the Dominion Parliament by generalizing a law and making it applicable to the whole Dominion could nullify the powers reserved to the provinces under the constitutional Act. And he quotes in confirmation of his opinion a question put to counsel by the President of the Privy Council, "Do you mean that by generalizing the powers contained in sect. 92, the Dominion Parliament can take away the powers of the Local Legislature?" A moment's consideration will show that they possess no such power.

I think the principle must be clear that neither the Dominion Parliament nor the Local Legislature can attract to itself a jurisdiction in matters assigned exclusively to the other power by the mere device of enlarging the geographical area so as to include the whole of the provinces, nor in the other case by restricting the area within which the power is to be exercised.

And I wish to add that there is no such thing as overlapping contemplated in the Act, nor any such principle as local legislation giving way to or being overborne by Dominion legislation, as would appear sometimes to occur in the courts of the United States, except in the two cases provided for by sect. 95. With the exception of those two cases the distribution of legislative functions is of an exclusive character, and being exclusive, if it falls within the jurisdiction of one Parliament it is necessarily excluded from that of

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(1) 7 App. Cas. 829; *ante*, vol. 2, p. 12.

the other. Once we find that the power to regulate or prohibit the sale of intoxicating liquors is given under sect. 92, it must be read as an exception to sect. 91, which would then read : the Parliament may make laws for the peace, order, and good government of Canada, but this is not to interfere with the right granted exclusively to the local legislatures to regulate the liquor traffic.

That this is the view taken by Lord Hobhouse in the Privy Council appears where he says that *Russell v. The Queen* (1) does not intend to decide that if the subject is one attributed to the provincial legislature the Dominion can get seizin of it by extending it beyond the province.

[590] The two cases mentioned in sect. 95 are agriculture and immigration, where the powers are concurrent, and here of course provision had to be made for one or other giving way in the event of their clashing, and so it is specially provided that the local legislation in those two cases should be valid only so far as it does not conflict with that of the Parliament of Canada.

There is in my opinion no general rule or principle, and no ground for the contention that I have sometimes heard advanced, that in case of conflict the legislation of the Dominion must prevail ; on the contrary there can be no such conflict. Each is supreme upon the subjects entrusted to it, and it was assumed in the Imperial Act that there could be no conflict except in the two enumerated cases.

If for the reasons I have mentioned this subject does fall within sub-sect. 8 as a portion of the municipal institutions of the province, is there anything in any of the powers assigned exclusively to the Parliament of Canada to conflict with it ?

The only one which can by any stretch of interpretation be held to do so is that relating to the regulation of trade and commerce, and many of the remarks I have made will equally apply to this branch of the case.

If I am correct in assuming that the right to pass a prohibitory law exists in the Local Legislature, even if it does incidentally affect trade and commerce, it must be held, in the language of that eminent and lamented judge, the late Chief Justice Dorion, that this incidental power is included in the right to deal with it ; in other words, the right so to deal with trade and commerce must be regarded as an exception to the general power.

I should not regard the words " regulation of trade and commerce " in their unlimited sense, even if uncontrolled by the con-

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text in sect. 92 and other parts of the Act, as extending to such a regulation as a prohibitory liquor law in a province, but read in connection with sub-sect. 8 of sect. 92, they must, I think, be read as if it had contained a proviso to this effect, "but so as not to [591] interfere with the right reserved exclusively to the provincial legislature to prohibit the sale of intoxicating liquors."

That is the rule of interpretation laid down by the Privy Council in a very early case, viz., that sects. 91 and 92 are to be read together, and the language of one interpreted, and where necessary modified, by that of the other (1).

This would be my view were I at liberty to state my own opinion, but as at present advised I think we are bound by the decision of the Supreme Court in *City of Fredericton v. The Queen* (2), where that Court held, Henry, J., dissenting, that the power to deal with this subject was embraced within sub-sect. 2 [of sect. 91] relating to the regulation of trade and commerce. It is true that the decision in the Privy Council proceeded upon other grounds, but they say expressly, "they must not be understood as intimating any dissent from the opinion of the Chief Justice of the Supreme Court of Canada and the other Judges who held that the Act . . . fell within the class of subject, 'the regulation of trade and commerce.'"

It seems to me that until expressly reversed or reconsidered that judgment is binding upon us, whatever may be my own opinion.

In the same way the judgment of the Judicial Committee, though based upon a state of facts which rendered any other judgment, in my opinion, impossible, is, until reconsidered upon the additional material to which I have referred, binding upon me as a judgment.

If therefore, we had been dealing with the general question as to the right of the Provincial Legislature to pass a prohibitory liquor law, I should have been constrained to hold such legislation, contrary to my own opinion, *ultra vires*, but the question is confined, as I understand it, to the power of the legislature to re-enact sub-sect. 9 controlled, as it was supposed to be controlled at the time of confederation, by sect. 252.

Sub-sect. 9 is not very clearly expressed, and I must confess that my first reading of it led me to the conclusion that it referred to two distinct matters: 1st, the prohibiting the sale by retail in any [592] inn, and 2nd, the prohibition altogether, whether by wholesale or retail in any place, but upon further reading the various Acts

(1) [See *Citizens' Insurance Co. v. Parsons*, 7 App. Cas. 96, 109; *ante*, vol. 1, pp. 265, 273.] (2) 3 Can. S. C. R. 505; *ante*, vol. 2, p. 27.

then in force relating to fermented or other manufactured liquor, and sect. 252, I am satisfied that the whole section was intended to be confined to sales by retail in inns, and such sales as were authorized by shop licenses, and I adopt my brother MACLENNAN'S reasoning upon this branch of the case. Being therefore, a mere police regulation for the sale by retail the enactment is not open to the possible objection to which I have referred.

I answer the two first questions therefore in the affirmative.

Question three I answer in the negative, assuming as I do that the question is confined to the power of those bodies under the enactments referred to in the two previous questions now reviewed.

As to question four I do not consider a by-law under these sections necessarily invalid because it omits to provide a penalty.

MACLENNAN, J. A. :—

The first matter to be considered is the extent of the enactment of the late Province of Canada, 29-30 Vict. c. 51, s. 249, sub-s. 9, which has been re-enacted by the Acts in question.

The first member of the enactment authorizes the prohibition of sales by retail in any tavern, inn, or other house of public entertainment. It leaves sales by wholesale untouched, and it does not interfere with sales in other places than inns and places of public entertainment. The other member of the section then appears to deal with *all* kinds of sales, not merely those by retail, and with *all* places except houses of public entertainment, and would seem to authorize total prohibition both wholesale and retail in all places within the municipality, with the single exception of houses of public entertainment. If that were the effect of the enactment it [593] would seem to be very strange, for then under the by-laws which have been laid before us, which have put both members of the enactment in force, liquor could still be sold in houses or places of public entertainment but only by wholesale, and could not be sold anywhere else either by wholesale or retail. The legislature could hardly have intended anything so absurd as that, and yet that would appear to be the meaning of the enactment standing by itself.

I think, however, when the history of the legislation, the other co-existing enactments on the subject, and the context of the enactment itself are looked at, it will be quite apparent that the second member of the enactment must be construed as referring to sales by retail only, as well as the first, and that it was not intended thereby to confer any power on the municipalities to prohibit sales by wholesale.

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The first power of actual prohibition, as distinguished from mere licensing which was conferred on municipalities was in 1853 when by 16 Vict. c. 184, sect. 3 (2), townships, villages and towns were authorized to pass prohibitory by-laws, but that prohibition was distinctly confined to sales by retail ; and it was declared that selling in the original packages, in which the liquor was received from the importer or manufacturer, and not containing respectively less than five gallons, or one dozen bottles, should not be held to be a selling by retail.

The law remained in this state until the year 1858, when by the Consolidated Municipal Act of that year, 22 Vict. c. 99, sect. 245, sub-s. 6, the enactment was cast substantially into the form which is now before us for consideration.

After that the clause was twice re-enacted, first in the Consolidated Municipal Act of 1866, sect. 249, sub-s. 9, and again in the year 1869, by 32 Vict. c. 32, s. 6, sub-s. 7 ; but there was a slight change made in these two re-enactments by the insertion of the word "totally" in the Act of 1866, and the word "altogether" in the Act of 1869, after the word "prohibiting" in the second member of the enactment.

[594] I think it is very clear that as the clause stood in the Act of 1858 it left the law as to sales by wholesale untouched. It meant no more than this : municipalities may prohibit sales by retail in public houses, and they may also prohibit such sales in shops and other places. The prohibition of retail sales might be confined to public houses, or it might be extended to shops and all other places throughout the municipality, the kind of sale which was meant to be dealt with in the second part of the clause, being the same kind that was described in the first, namely, sale by retail.

The meaning and use of the words *totally* and *altogether* introduced in the subsequent re-enactments are not at first sight obvious. But that becomes apparent on examining sub-sect. 1, which defines shop licenses as licenses for the *retail* of liquor in quantities not less than a quart, in shops, stores or places other than inns or places of public entertainment. By sub-sect. 1, sales in shops, stores or places other than inns, etc., are prohibited in quantities less than a quart, unless under license ; but by sub-sect. 9, sales in such places may be prohibited totally or altogether. The shopkeeper's power of selling by retail was already subject to a partial prohibition under sub-sect. 1, namely, as to quantities less than a quart ; by this sub-sect. 9 his selling by retail may be prohibited altogether. The partial prohibition to which he was

before subject in his retail business, namely in quantities less than a quart, might now be made total. I think that is the sole force and effect of the words "totally" and "altogether"

Sub-sects. 1 and 9 are parts of the same section, and in sub-sect. 1 the sales intended to be dealt with are divided into two classes: the first class comprises sales in inns, alehouses, beerhouses, and any other houses or places of public entertainment; the other class comprises sales in shops, stores or places other than inns, alehouses, beerhouses, or places of public entertainment. In both classes the sales referred to are expressly limited to sales by retail. When we [595] come to sub-sect. 9, the same two classes are dealt with, but in briefer and less expanded language. There is the inn or public-house, and there are the shops and places other than the public-house. Sub-sect. 1 provides for the licensing of these two classes of places respectively, and sub-sect. 9 provides for prohibition in the same places, classifying them in the same way. To my mind it is irresistible that the sales intended to be dealt with are the same throughout, namely sales by retail only, although the word is not repeated with reference to shops. This construction makes the enactment sensible and consistent, and relieves it from what would otherwise, I think, appear to be an absurd meaning.

I think this construction is aided by sect. 247 of the Act of 1858 (or sect. 252 of the Act of 1866) which declares that no tavern or shop license shall be necessary for selling in the original packages in which it is received from the importer or manufacturer so long as they contain not less than five gallons or one dozen bottles. That section took the place of the exception in the Act of 1853 already referred to, and defined what was wholesale and what was retail, for the purposes of the Act. I do not, however, think that section was essential to the construction which I put upon sect. 249.

In *Slavin v. Village of Orillia*, (1), the late Chief Justice Richards, in delivering the judgment of the Court, expressed the opinion that the prohibiting power of this section was confined to sales by retail, and he pointed out that prior to confederation the Legislature of Canada limited the granting of licenses to persons who sold by retail, and did not require the manufacturer or importer to obtain a license to sell by wholesale; and that legislation as to excise or manufacture, and the licensing of those engaged in that business, was kept distinct from the legislation as to shop and tavern licenses.

The enactment in question then, in 1866 and 1869, and until it was repealed by 37 Vict. c. 32, s. 61, was merely a power granted to

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(1) 36 U. C. Q. B. 159, 176, 177; *ante*, vol. 1, pp. 688, 704, 705.



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[596] municipalities to prohibit the *retail* traffic in liquors. It was not a power of *total* prohibition, but a comparatively small power confined to retail business, and was the same which was conferred first in the year 1853, and which was possessed by the municipalities unimpaired at the time of confederation.

Coming to the conclusion that the enactment in question is confined in both its members to sales by retail, I think it follows clearly that it was competent to the Legislature of Ontario to re-enact it as falling within the class of subjects, "Municipal Institutions in the Province," under sub-sect. 8 of sect. 92 of the B. N. A. Act. It is unnecessary to repeat the argument which has been so fully and forcibly elaborated by other judges, beginning with the late lamented Chief Justice Richards in *Slavin v. Village of Orillia*, (1), above referred to. At page 175, with reference to the very enactment in question, he says: "As far as the Province of Upper Canada was concerned, the delegates" (for procuring the B. N. A. Act) "who represented the views of that section of the United Province of Canada, well knew what the municipal institutions of Upper Canada were, and some one of them had probably introduced and carried through the legislature, only a short time before, the Act passed on 15th August, 1866, entitled, 'An Act respecting the Municipal Institutions of Upper Canada,' 29-30 Vict. c. 51. They knew that in the sections of that Act already referred to the power was granted to the municipalities in Upper Canada, under certain circumstances, to limit the number of taverns and to prohibit the licenses of shops for the sale of spirituous liquors in the several municipalities. When, then, this Imperial Act uses the very words of the title of this bill in giving as one of the class of subjects on which the Provincial Legislature may pass laws, viz, 'Municipal Institutions in the Province,' can there be any reasonable doubt that it was expected and intended that the municipal institutions which were to be constituted under that authority would possess the same powers as those which were then in existence, under the same name, in the Province. I should think not."

[597] In *Sulte v. Three Rivers*, (2), at pp. 40 et seq. Mr. Justice Gwynne enters still more elaborately into the argument, and at p. 43 says: "I cannot doubt that by item No. 8 of sect. 92 which vests in the provincial legislatures the exclusive power of making laws in relation to municipal institutions, the authors of the scheme of confederation had in view municipal institutions as they had then already been organized in some of the provinces, and

(1) 36 U. C. Q. B. 159; *ante*, vol. 4, pp. 688, 702.

(2) 11 Can. S. C. R. 25; *ante*, vol. 4, pp. 305, 319, 322.

that the term as used in the B. N. A. Act, unless there be some provision to the contrary in sect. 91 of the Act, comprehends the powers with which municipal institutions, as constituted by Acts then in force in the respective provinces, were already invested for regulating the traffic in intoxicating liquors in shops, saloons, hotels and taverns, and the issue of licenses therefor, as being powers deemed necessary and proper for the beneficial working of a perfect system of local municipal self-government."

In delivering the judgment of the Quebec Court of Appeal, in the case last mentioned, Mr. Justice Ramsay went further than is necessary for the decision of this case, and held that the right to pass a prohibitory liquor law for the purposes of municipal institutions had been reserved to the local legislatures by the B. N. A. Act; and in upholding that judgment in the Supreme Court, Mr. Justice Strong says he entirely agrees with the judgment delivered by Mr. Justice Ramsay. I am not sure, however, that he means to express approval of that judgment to the full extent expressed by the learned Judge of the Court below, as the affirmance of the judgment did not absolutely require it.

It is not necessary for the purpose of answering the questions before us, to determine how far by reason of the existence, at the time of confederation, of the Dunkin Act, the provinces may, under sub-sect. 8 of sect. 92, have the power of absolute prohibition, and I desire to express no opinion on that point one way or the other. It is enough to say that I think it clear that under that section the province has the power to revive the enactment in question, and that our answer to the first two questions ought to be in the affirmative.

With regard to the third question, I am of opinion that as incidental to the power to prohibit the retail traffic in liquor the province must have the power, acting bona fide, to define from time to time what constitutes retail traffic. We have seen what the definition was in the Act of 1853. It was substantially the same under the Acts of 1858 and 1866. This has been changed, and is now regulated by the R. S. O. (1887), c. 194, s. 2, sub-ss. 2, 3 and 4. In my opinion the municipalities named in the third question cannot at present prohibit under the revived enactment such sales as are described in sub-section 4.

In answer to the fourth question, I am of opinion that the want of a penalty does not invalidate such a by-law.

OSLER, J. A., declined to give any opinion.

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[*Reported 14 Legal News, 369.*]

LYNCH, J. :—

In 1890 the Legislature of Quebec, by the Act 53 Vict., c. 79, incorporated the town of Magog ; and by sect. 39 power was given the municipal council to pass by-laws, among other purposes “To restrain, regulate or prohibit the sale of any spirituous, vinous, alcoholic or intoxicating liquors, by retail or wholesale within the limits of the town.”

On the 13th April, 1891, the council of the town of Magog passed the following by-law : “It is hereby enacted that on and after the 1st day of May, 1891, the granting of licenses for the sale of spirituous, vinous, alcoholic or intoxicating liquors in any quantities, by wholesale or retail, in stores, shops and all other places (excepting hotels) within the limits of the town of Magog, is hereby prohibited, and the granting of certificates for such sale will be refused by this council in accordance with the provisions of article 39 of the Act of incorporation of the town of Magog and other provisions of the statutes of the Province of Quebec.”

It would appear that prior to the 1st of May last, petitioner had a license for the sale of liquor by wholesale at said town of Magog ; and that he subsequently applied to the defendant, the collector of provincial revenue for said district, for the renewal of such whole-sale license, tendering him therefor the fees fixed by the statute 54 Vict., c. 13, s. 12. To this tender formally made by a notary public, defendant answered that he could not accept, that he must be governed by the dispositions of the Act 53 Vict., c. 79, and of the by-law passed by the corporation of Magog in virtue of this statute, so long as that by-law remains in force.

On the 17th August last, petitioner applied to this court for the issuance of a writ of mandamus, addressed to the defendant, ordering him to appear and show cause why a peremptory writ should not issue, enjoining him to grant petitioner the whole-sale license for which he had applied ; and with the petition was a deposit of the amount of fees required by law. It was ordered that a copy of the petition should be served on the defendant, with a notice that the same would be heard on the 20th.

On the last named day petitioner and defendant appeared by their respective counsel, and the corporation of the town of Magog applied to be permitted to appear and to be heard by counsel,

which application was granted. The main facts relied on by petitioner were admitted at the argument, and the only question at all seriously discussed was the constitutional right of the Quebec Legislature to authorize the council of Magog to prohibit the sale of liquor as had been done by the section of the Act of incorporation above quoted. It was incidentally suggested by defendant's counsel that the allegations of the petition did not disclose a right to the writ of mandamus, and that the more correct proceeding on the part of petitioner would be an action to set aside the by-law. [370] It is alleged that it was the duty of the defendant, on payment of the prescribed fee, to have granted petitioner his license; and if that be so the writ is clearly demandable under par. 2 of art. 1022 C. P. In the *Sulte Case* (1), which was not unlike the present one as regards the principle involved, the proceeding was by mandamus, and the defendant raised the same objection, but it was overruled, and the case went to the Queen's Bench and Supreme Court. On the suggestion of petitioner's counsel the Attorney-General has been notified to appear if he saw fit, and he has declined to do so.

The issue, therefore, is clear and distinct, and, although differing in some respects from that presented in what may now be regarded as the leading and decisive cases affecting the respective powers of Parliament and of legislature, recourse must be had to them to aid in determining where the legislative power rests. As regards the matter now under consideration, the sole questions are had the legislature the right to confer upon the Magog council the power to pass a by-law to prohibit the sale of liquor by wholesale, and was defendant bound to observe such by-law.

Our jurisprudence on the general question of prohibitory power was, certainly, for several years after confederation, in what may be designated an embryo state, not having received the full development which has more recently been given to it by the pronouncements of the highest courts of the Province, of the Dominion and of the Empire. Among the early decisions which are quoted in support of the view that Parliament alone can deal with the question of prohibition is that of *Cooey v. Municipality of Brome* (2). Having been counsel in that case, I know something of what the issues really were. It was on a petition to set aside a by-law adopting the Temperance Act of 1864, which it was contended had been repealed, as regards the Province of Quebec, by the Muni-

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(1) 11 Can. S. C. R. 25; *ante*, vol. 4, p. 305.

(2) 21 L. C. Jurist 182; *ante*, vol. 2, p. 385.



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pal Code and the License Act. The late Mr. Justice Dunkin did hold that the Legislature had not repealed, and could not repeal, the Temperance Act. His judgment was set aside by the Court of Appeals on a different ground—an informality in the manner of taking the vote. I find, however, that the members of that court expressed their views freely on the question of legislative power. The late Sir Antoine Dorion said: “Before the union of the Provinces was effected by confederation, the power to prohibit the sale of intoxicating liquors had already been conferred by the Temperance Act of 1864, to the municipalities of the Provinces of Upper and Lower Canada. It was by that Act made a matter of local and municipal regulation. By the confederation Act all the laws then in force in the several provinces were continued (sect. 129) and municipal institutions (sub-sect. 8) as well as all matters of a merely local or private nature in each province (sub.s. 16, sect. 92) were placed under exclusive legislative control of the several provinces. In the absence of any expressions to restrict the powers so conferred, they must be understood to comprise all those matters, which at the time the union was effected, had been considered by the then existing legislatures as belonging to municipal institutions and as being of a local or provincial character. This would comprise the authority which the legislature of United Canada had already delegated to the several municipalities to prohibit the sale of intoxicating liquors within the limits of such municipalities. The meaning of the words trade and commerce as used in the second sub-section of sect. 91 of the B. N. A. Act ought to be restricted to those branches of commerce of a broader application than those already enumerated and which are specially provided for in sect. 91, such as the import and export trade of the country, customs and excise duties, and generally all those matters of trade affecting the whole Dominion or more than one of the provinces or their trade relations with one another, or with the Empire or any of its possessions. I do not wish here to lay down as a rule that there are no cases in which the Dominion Parliament could not regulate or prohibit the sale of intoxicating liquors or other articles of trade within the provinces composing the Dominion.

“It is not necessary to express any opinion what might be the [371] authority of the Dominion Parliament in certain possible contingencies; it suffices for this case to say that the Temperance Act of 1864 must be considered as belonging to the latter class of subjects coming within the description of local or police regulations, and this I believe is the opinion of all the members of this court.

"From the best consideration I have been able to give to the question now under review, I have come to the conclusion that the legislature of the Province of Quebec had full power to deal with the Temperance Act of 1864, and to alter and repeal any of its provisions conferring on municipal councils the right to prohibit the sale of intoxicating liquors within their municipality."

Mr. Justice Ramsay said: "Fortunately we are not called upon to reconsider sub-s. 9 of sect. 92 of the B. N. A. Act, for a prohibition to sell intoxicating liquors is certainly not a license, and it cannot assist in raising a revenue. Then is a prohibition to sell intoxicating liquors within the limits of a local municipality, a matter of a merely local or private nature in the province, and furthermore does it interfere with the regulation of trade and commerce? I cannot think that the exclusive power to regulate trade and commerce can be interpreted in an absolute manner; and we must therefore constantly enquire whether the matter does not more exclusively belong to some local power. Here it is contended that a prohibitory by-law is not dependent on the municipal institutions of the province. But, as it has already been observed, the Act of 1864 evidently treats it as a municipal matter, and to attempt to treat these local prohibitions as a regulation of trade and commerce appears to me to be ridiculous exaggeration. I therefore think that the local legislature has the right to deal with the prohibition."

Mr. Justice Cross said: "Municipal government may include much that concerns the regulation of trade, and laws affecting trade may interfere largely with municipal regulations. When special trading operations become prejudicial to public health and morals, the higher law of the public good would seem to require the supremacy of the local municipal control to restrain the mischief of laws of the class to regulate trade which should be general, not local or special in their application. To prevent abuses resulting from the sale of intoxicating liquors on Sunday, or at inopportune places, might be held to be reasonable exercise of local municipal power, although it might affect the volume of trade in these articles. We find the power to prohibit the sale of intoxicating liquors distinctly attributed to, and exercised by, our municipal institutions before confederation; and, being already invested with that power, we have no warrant for divesting them of it, and must, therefore, leave them in possession of it."

I have quoted thus largely from the views of the learned judges of the Provincial Court of Appeal in the *Cooley Case* (1)—which, so

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(1) 21 L. C. Jurist 182; *ante*, vol. 2, p. 385.



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far as I know, are not reported—in order to show how the opinions expressed thus early (1878) by them were afterwards, in the main, adopted by the higher appellate courts, which were subsequently called upon to judicially interpret sects. 91 and 92 of the Union Act, regarding the respective powers of Parliament and legislature to deal with the vexed questions of license and prohibition. I ought to say, to correct a false impression, that the judgment of the Court of Appeal in the *Cooley Case* (1) was set aside by the Supreme Court by consent, the petitioner not caring to proceed further.

In 1877 the legislature of Ontario adopted the Liquor License Act, which contained stringent provisions respecting the regulation of the sale of spirituous liquors, and gave rise to what is known as the *Hodge Case* (2) which was adjudicated upon by the Privy Council the 13th December, 1883.

In 1878 Parliament passed the Canada Temperance Act, which permitted the electors of any municipality to declare in favour of the prohibition of the traffic in intoxicating liquors within the limits of that municipality. The *Russell Case* (3) resulted from this legislation and was pronounced upon by the Privy Council on the 23rd June, 1882.

[372] In 1883 Parliament, largely influenced by inferences drawn from the judgment of the Privy Council in the *Russell Case*, (3) legislated respecting the sale of intoxicating liquors, and the issue of licenses therefor. This legislation was regarded with great disfavour by all the provinces, and a joint case to test its constitutionality was submitted to the Supreme Court which declared it ultra vires of the powers of Parliament in its general principles; and this view was confirmed by the decision of the Judicial Committee of the Privy Council rendered on the 12th day of December, 1885. (4)

While their Lordships of the Privy Council have in these three important judgments remained strictly within the issues submitted to them, they have laid down as applicable to each distinct case certain general principles of interpretation, which must always serve as determining tests in construing the powers of Parliament and legislature in dealing with the regulation of the liquor traffic.

The ruling on the Liquor License Act of 1883 has set at rest all controversy regarding the question as to where lies, under the constitution, the licensing power. It is thus tersely expressed “that

(1) 21 L. C. Jurist 182; *ante*, vol. 2, p. 385.

(3) 7 App. Cas. 829; *ante*, vol. 2, p. 12.

(2) 9 App. Cas. 117; *ante*, vol. 3, p. 144.

(4) [See *ante*, vol. 4, p. 342.]

the Liquor License Act of 1883 and the Act of 1884, amending the same, are not within the legislative authority of the Parliament of Canada."

By the *Russell Case* (1) it is determined that Parliament had authority to pass the Canada Temperance Act of 1878, and it is declared: "Parliament does not treat the promotion of temperance as desirable in one province more than in another, but as desirable everywhere throughout the Dominion. . . . Parliament deals with the subject as one of general concern to the Dominion upon which uniformity of legislation is desirable, and the Parliament alone can so deal with it."

By the *Hodge Case* (2) it is decided that the Liquor License Act of 1877 "is so far confined in its operation to municipalities in the Province of Ontario, and is entirely local in its character and operation," that the regulations which may be adopted under it, "seem to be all matters of a merely local nature in the province, and to be similar to, though not identical in all respects with, the powers then belonging to municipal institutions under the previously existing laws passed by the local parliaments. Their Lordships consider that the powers intended to be conferred by the Act in question, when properly understood, are to make regulations in the nature of police or municipal regulations of a merely local character. . . . As such they cannot be said to interfere with the general regulation of trade and commerce which belongs to the Dominion Parliament, and do not conflict with the provisions of the Canada Temperance Act, which does not appear to have as yet been locally adopted. The subjects of legislation . . . seem to come within the heads Nos. 8, 15 and 16 of sect. 92, of British North America Statute, 1867."

Since the rendition of these judgments, or at least of some of them, our courts have had occasion in several instances to apply them. In the *Sulte Case* (3), to which reference has already been made, the late Mr. Justice Ramsay in rendering the unanimous judgment of the Court of Queen's Bench, October 7th, 1882, said: "It may be at once conceded that the power to pass prohibitory liquor laws is not essential to the existence of municipal institutions, and that consequently in a very restricted reading of sub-s. 8, (sect. 92) it would not justify the local legislature in passing a prohibitory liquor law. . . . In so far as the Province of Quebec

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(1) 7 App. Cas. 829; *ante*, vol. 2, p. 12.

(2) 9 App. Cas. 117; *ante*, vol. 3, p. 144.

(3) 5 Legal News, 330; *ante*, vol. 2, p. 280.



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is concerned, municipal institutions were the creation of special statutes. The general Act was passed no longer back than 1855. Among other things county councils were given the power to make by-laws 'for prohibiting and preventing the sale of all spirituous, vinous, alcoholic and intoxicating liquors, etc.' . . . These statutes were in force at the time of confederation. . . . We hold, then, that under a proper interpretation of sub-sect. 8, the right to pass a prohibitory liquor law for the purposes of municipal institutions has been reserved to the local legislatures by the B. N. A. Act. We have suspended our judgment in this case for an unusual length of time, awaiting the decision of the Privy Council in [373] the case of *Russell v. The Queen* (1), . . . It has not either expressly or by implication maintained that the Dominion Parliament can alone pass a prohibitory liquor law." The *Sulte Case* went to the Supreme Court, where the judgment of the Court of Queen's Bench was unanimously confirmed January 12th, 1885 (2). The Chief Justice: "The case of *Hodge v. The Queen* (3) just decided by the Privy Council covers the constitutional question." STRONG, J.: "I agree entirely with the judgment delivered by Mr. Justice Ramsay. *Hodge v. The Queen*, (3) decided by the Privy Council since the judgment of the Court of Queen's Bench was delivered, having put an end to the question, any further discussion of it is unnecessary." FOURNIER, J.: "The constitutional question has now to my mind been definitely settled by the decision of the Privy Council in the case *Hodge v. The Queen*." (3) GWYNN, J.: "It seems to be supposed that the judgment of this court in the *City of Fredericton v. The Queen*, (4) is an authority to the effect that since the passing of the B. N. A. Act it is not competent for a provincial legislature to restrain or prohibit in any manner, the sale of any spirituous liquors, and that therefore the legislature of the Province of Quebec could not invest the corporation of the city of Three Rivers with the powers purported to be vested in them by sects. 74 and 75 of the Act, 38 Vict., c. 76, and that the Dominion Parliament alone could enact the provisions contained in sect. 75, (the 1st par. of which reads for restraining and prohibiting the sale of any spirituous, etc.) . . . What was decided in the *City of Fredericton v. The Queen* (4) was that the provincial legislatures had not jurisdiction to pass such an Act as the Canada Temperance Act of 1878, and that the Dominion

(1) 7 App. Cas. 829; *ante*, vol. 2, p. 12.

(2) 11 Can. S. C. R. 25; *ante*, vol. 4, p. 305.

(3) 9 App. Cas. 117; *ante*, vol. 3, p. 144.

(4) 3 Can. S. C. R. 505; *ante*, vol. 2, p. 27.

Parliament alone was competent to pass it, . . . but there was nothing whatever in the decision calculated to call in question the right of the provincial legislatures to insert in all Acts in relation to municipal institutions, such provisions as those in question here."

In *Molson v. Lambe* (1), the Court of Appeal again maintained the constitutionality of the Quebec License Act, the Chief Justice remarking that they were to be governed by the decision in the *Hodge Case* (2), "followed by the last decision rendered by the Privy Council, holding that the right to legislate on the issue of licenses for the sale of liquor by wholesale or by retail, belonged to the local legislatures." This case went to the Supreme Court, where the appeal was dismissed (3). All of the judges concurred in saying that they regarded the constitutional question as definitely settled. GWYNNE, J., observed: "All of these judgments rest upon the foundation that laws which make, or which empower municipal institutions to make regulations for granting licenses for the sale of intoxicating liquors in taverns, shops, etc., . . . are laws which, as dealing with subjects of a purely local, municipal, private and domestic character are intra vires of the provincial legislature."

In the last reported case bearing on this matter, of which I have any knowledge, *Moir and Village of Huntingdon* (4) the Court of Queen's Bench held, that the power conferred upon local councils by art. 561 of the municipal code to prohibit the sale by retail of intoxicating liquor, was within the competency of the legislature of the province.

The learned counsel for the petitioner has sent me up for reference the record of a case from Three Rivers, *Desserveau and Lasalle*, together with the judgment of Mr. Justice Bourgeois therein. The facts there were in the main, as nearly as possible identical with those admitted to exist in this case. The learned judge condemned the collector to issue the license, holding that he had shown no legal reasons for his refusal to do so. I regret very much not to have had an opportunity of examining the reasons which led my brother judge to the conclusion at which he must have arrived that the local council of the parish of St. Anne de la Perade had no authority to pass a by-law, prohibiting the sale of liquor in such manner and to such extent as to divest the collector of provincial revenue of the obligation to deliver a

(1) M. L. R., 2 Q. B. 381; ante, vol. 4, p. 357.

(2) 9 App. Cas. 117; ante, vol. 3, p. 144.

(3) 15 Can. S. C. R. 253; ante, vol. 4, p. 334.

(4) 20 R. L. 684.

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license to sell by wholesale. The conditions here are not however exactly similar to what they were in that case. It is possible that the decision there turned upon the absence of any provision in the [374] municipal code authorizing the council of the parish of St. Anne de la Perade to pass such a by-law, and that possibly the by-law itself did not apply, and could not be applied, to the case of a wholesale liquor license, and was limited in its operation to the prohibition of the sale of intoxicating liquors in quantities less than three gallons, or one dozen bottles, as authorized by art. 561 of the municipal code, and consequently could not apply to a wholesale license which would be in excess of the power thus delegated. I am not now called upon to determine any such questions. What the petitioner asks me to do, is to declare that the legislature of Quebec had no right or authority under sect. 92 of the B. N. A. Act, to confer upon the municipal council of the town of Magog the power of passing a by-law to prohibit within its limits the sale of liquor by wholesale, as has unquestionably been done by 53 Vict. c. 79, of the Quebec statutes, sect. 39. The Supreme Court and the Court of Appeals have, in the decisions referred to, supported by the judgment of the Privy Council in the *Hodge Case* (1), emphatically laid down the doctrine that the regulation of the liquor traffic, wholesale and retail, is within the exclusive control of the local legislature; and the Court of Appeals in the *Moir Case* (2) has affirmed, in the most distinct manner, the right of the legislature to delegate to municipal councils the power of prohibiting the sale of liquor by retail. In the *Severn Case* (3) the Supreme Court went far in the direction of holding that the regulation of, and the right to license, the wholesale trade was not within the attributes of the legislature; but in the *Molson Case* (4) the Chief Justice remarked: "In view of the cases determined by the Privy Council since the case of *Severn v. The Queen* (3) was decided in this court, which appear to me to have established conclusively that the right and power to legislate in relation to the issue of licenses for the sale of intoxicating liquors by wholesale and retail, belong to the local legislature, we are bound to hold that the Quebec License Act of 1878 and its amendments, are valid and constitutional." It may then be assumed as judicially settled that the legislature of Quebec had and has, under the constitution, the power to delegate to municipal councils the authority to license or to prohibit the sale by retail of intoxicating

(1) 9 App. Cas. 117; *ante*, vol. 3, p. 144.

(2) 20 R. L. 684.

(3) 2 Can. S. C. R. 70; *ante*, vol. 1, p. 414.

(4) 15 Can. S. C. R. 253; *ante*, vol. 4, p. 334.

liquor, and to license the sale by wholesale ; but it is said that the same power does not exist concerning the prohibition of the sale by wholesale. Why should the one be treated differently from the other ? It may be as important in the interest of the locality, and in some instances possibly more so, to prohibit the sale by wholesale as by retail ; and can the one local prohibition be regarded as an interference with the regulation of trade and commerce when the other is not ? I must confess my inability to appreciate the distinction. The late Chief Justice Dorion, in the course of his observations in the *Cooey Case* (1), quoted two decisions of the Court of Queen's Bench of Ontario, which have a decided bearing on the point now under consideration. In the case of *Reg. v. Taylor*, (2) it was said : "The Ontario legislature has the right to license or prohibit the sale of liquors in shops and taverns, and in other places of the like kind, because it has the exclusive power over municipal institutions, and these institutions had before and at the time of confederation the exercise of these powers ; and because such power, read in connection with sect. 92, sub-s. 16 of the confederation Act, is now a matter of 'a merely local or private nature in the province.' The power last referred to is in restraint of trade, as well as a matter of police. The general regulation of trade and commerce which is vested in the Dominion Parliament, must be considered to be modified by the power which the Ontario legislature, acting in relation to municipal institutions and to licenses, may properly exercise." The same court also held in *Slavin v. Village of Orillia* (3), that "by-laws passed by municipal corporations wholly prohibiting the sale of spirituous liquors in shops and places other than houses of public entertainment and limiting the number of tavern licenses to nine," were "valid as being within the power of the corporation, under 32 Vict. c. 32, Ont., and that it was within the authority of the provincial legislature to confer such power."

These judgments express my view of the power of the legislature, [375] and they have received their full confirmation by the judgments since rendered and to which I have already referred. Before confederation our municipal law, c. 24 of the Con. Stat. of Lower Canada, like that of Upper Canada, recognised the right of municipal councils to prohibit generally the sale of liquors ; sect. 26, sub-s. 11, conferred upon all county councils in the month of March of each year, the power to pass by-laws "for prohibiting and pre-

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(1) 21 L. C. Jurist, 182 ; ante, vol. 2, p. 385.

(2) 36 U. C. Q. B. 183.

(3) 36 U. C. Q. B. 159 ; ante, vo 1, p. 688.



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venting the sale of all spirituous, etc., liquors," and by sub-s. 16 of sect. 27, every local council might make a similar by-law in any year when the county council had failed to do so in the month of March. This power to prohibit generally the sale of liquors, thus unmistakably conferred upon and enjoyed by municipal councils, prior to confederation, has been held to be continuing and not to have been disturbed by any provision of the Union Act; and it certainly has not since been taken away by any competent authority.

I do not feel that it is necessary for me to pursue the enquiry further. From the best thought and attention which I have been able to give this matter, I have come to the conclusion that the inherent right and responsibility, under the constitution, of controlling municipal institutions in the province belongs to the legislature, and that the legislature may, and from its very nature must delegate this control to councils, the recognised guardians and administrators of these municipal institutions, and that one of the most important elements of this control is the regulation of the liquor traffic, which may be effected in the discretion of the council, under the power so delegated, either by a general or partial system of license, or by a general or partial system of prohibition, or by a combination of both systems.

Was defendant bound to conform to the requirement of the by-law prohibiting the sale of liquor by wholesale in the town of Magog, and to refuse the license asked for by petitioner?

By the Quebec License Act, 41 Vict. c. 3, s. 48, the applicant for a wholesale shop license was obliged to produce the same certificate confirmed by the council, as was required for a hotel license. This formality being observed, and on payment of the requisite duty, he was entitled to his wholesale license, sect. 70, unless the sale in the municipality had been prohibited by by-law, sect. 51. Sect. 48 was amended in 1880, by 43-44 Vict. c. 11, s. 14, by taking away the necessity of a certificate for a wholesale license and by providing that "wholesale liquor shop licenses are granted simply upon payment to the proper license inspector of the required duties and fees." This latter provision was not reproduced in the Revised Statutes of Quebec, and has disappeared entirely, so that under art. 892 it is now the duty of the collector of provincial revenue to issue on application a wholesale liquor shop license on payment of the requisite fees, unless he has received, under art. 860, copy of a municipal by-law prohibiting the sale of liquors in the municipality, in which case he is forbidden to issue any license except it be for a steamboat bar or a railway buffet. Here it is admitted

that the defendant had received a copy of the by-law in question at the time when petitioner applied to him for a wholesale liquor license, and I cannot conceive how it was possible for defendant to have given any other answer than the one which is embodied in the formal tender and offer made to him by petitioner of the requisite fees and which he signed : " Je ne puis accepter cette offre parceque je dois m'en tenir aux dispositions de l'acte 53 Vict. c. 79 et du reglement passé par la Corporation de Magog en vertu de ce Statut tant que le dit reglement reste en vigueur."

On the whole I consider that sect. 39 of cap. 79, 53 Vict., Quebec, in so far as it authorizes the municipal council of the town of Magog to pass by-laws to restrain, regulate or prohibit the sale of any spirituous, vinous, alcoholic or intoxicating liquors by retail or wholesale within the limits of the town, is within the competency and powers of the legislature of this Province, and not ultra vires thereof, that the municipal council of the town of Magog in passing and enacting the by-law which is attacked by petitioner, was competent and acted intra vires of the power conferred upon it by said section, that the said by-law is in all respects legal and binding for all the purposes thereof and of said section, and that defendant [376] acted correctly and legally in refusing to accept the tender and offer of petitioner. The petition cannot be granted and is therefore rejected with costs.

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J C.\*

## PRIVY COUNCIL.

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July 26.

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July 28.

FIELDING AND OTHERS.....*Defendants;*

AND

THOMAS.....*Plaintiff.**On Appeal from the Supreme Court of Nova Scotia.**[Reported [1896] A. C. 600.]**Law of Nova Scotia—Jurisdiction of Provincial House of Assembly—  
Immunities of its Members — Order of Imprisonment — Revised  
Statutes, 5th Series, c. 3.*

The Nova Scotia House of Assembly has statutory power to adjudicate that wilful disobedience to its order to attend in reference to a libel reflecting on its members is a breach of privilege and contempt, and to punish that breach by imprisonment.

In an action for assault and imprisonment against members of the Assembly who had voted for the plaintiff's imprisonment:—

[601] *Held*, that the sections of the local Revised Statutes, 5th series, c. 3, which create the jurisdiction of the House and indemnify its members against legal proceedings in respect of their votes therein, are a complete answer to an attempt to enforce civil liability for acts done and words spoken in the House. Those sections, except so far as they may be deemed to confer any criminal jurisdiction, otherwise than as incident to the protection of members, are *intra vires* of the local legislature, as relating to the constitution of the province within the meaning of s. 92 of the British North America Act, 1867, or under the authority of s. 5 of the Colonial Laws Validity Act (28 & 29 Vict. c. 63), which was recognised by the Act of 1867, s. 88.

*Barton v. Taylor*, (11 App. Cas. 197) distinguished.

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\**Present*:—LORD HALSBURY, L.C., LORD HERSHELL, LORD WATSON, LORD MACNAGHTEN, LORD MORRIS, LORD DAVEY, and SIR RICHARD COUCH.

APPEAL from an order of the Supreme Court (Dec. 2, 1893) (1) dismissing the appellants' application to set aside a judgment and verdict in favour of the respondent for \$200 damages, and to enter judgment for the appellants.

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The circumstances out of which litigation arose were these. The respondent was Mayor of Truro, in the Province of Nova Scotia. Lawrence, one of the appellants, was recorder of the town and a member of the House of Assembly. Lawrence's salary was increased by an Act of the Local Legislature (54 Vict. c. 119), whereupon the town council exhibited articles of complaint against him, charging him with misbehaviour in his office of recorder and as member of the legislature, and in particular with having promoted the increase of his own salary. The respondent afterwards signed and published a petition, annexing a copy of the articles, in which petition were certain statements reflecting upon the conduct of Lawrence, on whose motion a resolution was passed by the House that the respondent had by such publication been guilty of a breach of the privileges of the House, and should be summoned to attend at its Bar. The respondent contended that his acts complained of were done by him in good faith in his capacity of mayor, and were not libellous. He was ordered to withdraw and remain in attendance, and subsequently ordered to be called in and reprimanded. He refused to obey, and left the precincts of the House, whereupon he was by order of the House arrested by the serjeant-at-arms, brought to the Bar of the House, and directed by the House to be committed to the common gaol at Halifax for forty-eight hours, with a proviso that imprisonment [602] should cease if any prorogation supervened. He was imprisoned, but shortly afterwards discharged on a writ of habeas corpus issued out of the Supreme Court.

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(1) 26 N. S. Rep. 55; *post*, p. 414.



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Two days afterwards, on April 27, 1892, the respondent brought his action against the appellants, all of whom were present at and voted for the passing of the resolution which led to the imprisonment.

The defence rested upon Revised Statutes, 5th Series, c. 3, under which it was contended that the House of Assembly possessed the same privileges, immunities, and powers as were enjoyed by the House of Commons of Canada, and also of the United Kingdom; that by ss. 29, 30, and 33 the House was a Court of Record, with an inherent power to punish insults to or libels on its members during session and that the appellants possessed the privileges of judges of a Court of Record; that by s. 26 they were exempt from any civil action or damages. Some of the appellants pleaded a special Act of indemnity relating to themselves passed on April 30, 1892, and entitled, "An Act to amend c. 3 of the Revised Statutes of the composition, powers and privileges of the House."

At the trial the judge ruled that the action must be dismissed as against the appellants protected by the last mentioned Act; but that as against the others the provisions of Revised Statutes, 5th Series, c. 3, under which they claimed to have proceeded, were not within the competency of the legislature.

On appeal McDonald, C. J. and Graham, E. J. agreed with the first Court that the provisions in question were ultra vires the Local Legislature, and that the indemnity clause (s. 26) did not apply. Ritchie, J. thought that the provisions were not ultra vires, and that the House was sitting as a Court of Record and acting within its jurisdiction, its members being protected accordingly. Weatherbe, J. thought that the statute should be construed as empowering the House to deal with matters of crime only as an incident of protecting members in their proceedings; that so construed it was not ultra vires and was applicable to the proceedings in question.

The Court being equally divided, the judgment appealed from was affirmed.

[603] *Cohen*, Q.C., *Longley* (Attorney General for Nova Scotia), and *Lewis Coward*, for the appellants, contended that the House of Assembly had power to commit for contempt committed in the face of the Assembly, and that the respondent had been guilty of such contempt. Reference was made to *Phillips v. Eyre* (1) and *Doyle v. Falconer*. (2)

(THE LORD CHANCELLOR. Those are cases which illustrate the implied power of the Legislature. Here there is a special Act, and the real question is whether it is *intra vires*).

But apart from the special statute, the House of Assembly has powers, inherent in it, necessary for carrying on its business as such, including the power of punishing for contempts committed in the face of the Assembly. With regard to the power of the Assembly, as defined by, or derived from, statute, reference was made to the Imperial Act 28 & 29 Vict. c. 63. s. 5, by which the right of representative colonial legislatures to make laws respecting their own constitution and powers was conferred upon them. The British North America Act 1867, does not purport to take away such right as regards Canada and its provinces. By s. 1 of 36 & 39 Vict. c. 38, which was substituted for s. 18 of the Act of 1867, the English Parliament defined the powers of the Dominion House of Commons; whilst it nowhere in the Act of 1867 or later defines those of the Assembly of Nova Scotia. But the Dominion House of Commons was created by the Act of 1867: the Nova Scotia House of Assembly existed prior thereto. Before 1867 Nova Scotia was governed by a Lieutenant-Governor and Legislative Assembly, who derived their powers under

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(1) L. R. 6 Q. B. 1.

(2) L. R. 1 P. C. 328, 340.



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s. 5 of 28 & 29 Vict. c. 63. By s. 88 of the Act of 1867 the Nova Scotia Constitution was continued as it existed at the date of the Union. Its power, therefore, to enact the provisions of Revised Statutes, c. 3, ss. 20 to 40, inclusive (see especially ss. 20, 29, 30, 31, and 33), relied upon by the appellants for their defence in this case, is derived from 28 & 29 Vict. c. 63. Beyond that, the Act of 1867, s. 92—see especially sub-ss. 1, 13 and 15—must be construed as conferring on the provincial legislature the exclusive right to amend the constitution of the province, to make laws affecting civil rights in the [604] province, and to impose punishment for violating any law of the province made in relation to any matter enumerated in s. 92. Sect. 91 must be read in conjunction with s. 92 and must not be construed so as to conflict with the fair meaning of s. 92. Reference was made to *Liquidators of the Maritime Bank of Canada v Receiver-General of New Brunswick* (1); *Attorney-General of Ontario v. Attorney-General for the Dominion* (2); and to *Citizens' Insurance Co. v. Parsons*. (3) It was contended that ss. 20 to 40, both in their general result and in their particular provisions, are amendments of the constitution of the province within the meaning of s. 92. Further s. 129 was referred to as preserving, and as intended according to its true construction to preserve, to the House of Assembly both the right to pass laws enabling it to commit for contempt and also its existing powers to commit for contempt and breach of its orders.

*Edward Blake*, Q.C. (of the Colonial Bar), and *Tyrrrell Paine*, for the respondent, contended that the provisions of c. 3 of 5th Series of Revised Statutes of Nova Scotia were ultra vires the local legislature. The appellants, they contended, could not rely on s. 20 of the Revised

(1) [1892] A. C. 437, 441; *ante*, pp. 1, 6.

(2) [1894] A. C. 189, 200; *ante*, pp. 266, 280.

(3) 7 App. Cas. 96, 107; *ante*, vol. 1, pp. 265, 271.

Statutes, 5th Series, c. 3, because that section only covered cases not specifically provided for. The present case is specifically provided for—if regarded as libel, by s. 29, sub-s. 1; if regarded as contempt for disobedience to an order of the House by s. 29, sub-s. 3. The respondent's case, however, with regard to both s. 20 and s. 29, is that they are *ultra vires*. They cannot be supported as being an exercise of the powers given by the Colonial Laws Validity Act, 1865. s. 5, for the definition of colonies given in that Act (s. 1) would not comprise the provinces united into the Dominion of Canada by the British North America Act, 1867. The legislative authority is different; the executive authority is different; the controlling power over legislation is different. Moreover, the effect of the British North America Act is to repeal the Colonial Laws Validity Act so far as the provinces are concerned. The provincial legislatures possess no [605] powers of legislation either inherent in them or dating from a time anterior to the British North America Act: *Bank of Toronto v. Lambe*. (1) In order to ascertain what the powers of a provincial legislature are you must refer to s. 92 of the British North America Act. The appellants rely upon sub-ss. 1, 13, and 15 of that section. Sub-s. 1 gives the power to amend the constitution. This, however, does not involve the capacity to take the extraordinary powers purported to be given by the Revised Statutes, 5th Series, c. 3. The capacity to take such powers and the power to amend the constitution are different things, and the Imperial Legislature, when they have intended to invest a colonial legislature with the capacity to take such powers, have used apt words for the purpose. See s. 18 of the British North America Act, s. 5 of the Colonial Laws Validity Act, and s. 35 of the Victoria Government Act, 18 & 19 Vict. c. 55. This last mentioned Act shews conclusively that the

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(1) 12 App. Cas. 575, 587, 588; *ante*, vol. 4, pp. 7, 22, 23.



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power to amend the constitution does not include the capacity to assume such powers as are here claimed, for by s. 60 of the Act the power to amend the constitution is fettered by conditions to which the capacity of assuming such powers is not subject.

With regard to sub-s. 13 of s. 92, which gives the power to make laws in relation to property and civil rights, the powers taken are really an interference with the powers given to the Dominion Parliament. With reference to the criminal law authorized by s. 91, sub-s. 27, whether regarded from the point of view of libel or contempt, the effect of the 20th and 29th sections of the Revised Statutes, 5th Series, c. 3, is to legislate as to criminal matters, and the legislation only incidentally relates to civil rights. For this purpose its real object and not its incidental effect must be regarded in order to determine whether it is within the competence of the provincial legislature. Sub-s. 15 of s. 92 has no operation unless the law is primarily in relation to some matter coming within that section. If it is then no doubt such law may be enforced by fine, penalty, or imprisonment.

If the appellants rely upon s. 30 of the Revised Statutes, 5th Series, c. 3, constituting each House [606] of the legislature a Court of Record, that section is ultra vires both for the reasons given as to ss. 20 and 29 and because it in effect appoints the judges of the Court contrary to the provisions of s. 96 of the British North America Act.

There remains s. 26 of the Revised Statutes, 5th Series, c. 3, which not only purports to take away the right of action against members, which it may be is legislation with regard to civil rights, but purports to alter the criminal law by giving the members immunity from prosecution. In fact, it makes any such action or prosecution a violation of the chapter, and, therefore, under s.

31 punishable as a crime. Such an interference with the liberty of the subject far transcends any powers possessed by the Imperial House of Commons, is in the highest degree tyrannical, and cannot be within the powers of the provincial legislature. If the appellants' contentions are correct, the provincial legislatures have far wider powers than those possessed by the Dominion Parliament, which by 38 & 39 Vict. c. 38, repealing s. 18 of the British North America Act, are limited to those possessed by the Imperial House of Commons at the time of the passing of any Dominion Act taking such powers.

Counsel for appellants were not heard in reply.

The judgment of their Lordships was delivered by

THE LORD CHANCELLOR :—

This is an appeal from an order of the Supreme Court of Nova Scotia dismissing the application of the appellants for an order that the verdict and judgment entered for the present respondent at the trial of the action before Townshend J. might be set aside and judgment should be entered for the appellants. By the verdict and judgment in question the appellants were found to have unlawfully assaulted and imprisoned the respondent. The Supreme Court were equally divided. McDonald, C.J. and Graham, E.J. were in favour of confirming the judgment, whilst Ritchie, J. and Weatherbe, J. held that judgment should be entered for the appellants. The judgment of Townshend, J. therefore stood confirmed.

The respondent was summoned to attend at the Bar [607] of the House of Assembly to answer a breach of the privileges of the House in having published a libel reflecting on a member or members of the House (in connection with their conduct as members of the House). He attended on two occasions and on the second occasion was ordered to withdraw and remain in attendance during the debate which took place. On being called in by the

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serjeant-at-arms by order of the speaker he refused to obey the order and left the precincts of the House.

It is not denied that the respondent intentionally disobeyed the order of the House. He was thereupon arrested by order of the House and on being brought to the Bar was adjudged to have been guilty of a contempt of the House committed in the face of the House and was committed to the common gaol of Halifax for forty-eight hours. Upon this he brought an action for assault and imprisonment and it is from the judgment in that action that the present appeal is brought. The appellants are sought to be made liable by reason of their having voted as members of the House of Assembly for the imprisonment of the respondent.

The acts complained of were justified under ss. 20, 29, 30, 31 of c. 3 of the Revised Statutes of Nova Scotia, 5th Series. The appellants also relied on the indemnity given to the members of the House of Assembly by s. 26 of the same Statute.

These sections are as follows:—

“ 20. In all matters and cases not specially provided for by this chapter, or by any other statute of this province, the legislative council of this province and the committees and members thereof respectively, shall at any time hold, enjoy and exercise such and the like privileges, immunities and powers as shall be for the time being held, enjoyed and exercised by the senate of the Dominion of Canada, and by the respective committees and members thereof, and the House of Assembly and the committees and members thereof, respectively, shall, at any time, hold, enjoy and exercise such and the like privileges, immunities and powers as shall for the time being be held, enjoyed and exercised by the House of Commons of Canada, and by the respective committees and members thereof; and such privileges, immunities

and powers, of both Houses, shall be deemed to be [608] and shall be part of the general and public law of Nova Scotia, and it shall not be necessary to plead the same, but the same shall in all courts of justice in this province, and by and before all justices and others, be taken notice of judicially."

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"26. No member of either House shall be liable to any civil action or prosecution, arrest, imprisonment or damages, by reason of any matter or thing brought by him by petition, bill, resolution, motion or otherwise, or said by him before such House; and the bringing of any such action or prosecution, the causing or effecting any such arrest or imprisonment and the awarding of any such damages, shall be deemed violations of this chapter."

"29. The following acts, matters and things are prohibited, and shall be deemed infringements of this chapter:—

"1. Insults to or assaults or libels upon members of either House during the session of the legislature."

The other provisions of the section are immaterial to the present purpose.

"30. Each House shall be a Court of Record, and shall have all the rights and privileges of a Court of Record for the purpose of summarily inquiring into and (after the lapse of twenty-four hours) punishing the acts, matters and things herein declared to be violations or infringements of this chapter; and for the purposes of this chapter each House is hereby declared to possess all such powers and jurisdiction as may be necessary for inquiring into, judging and pronouncing upon the commission or doing of any such acts, matters or things and awarding and carrying into execution the punishment thereof provided for by this chapter, and amongst other things each House shall have power to make such rules as may be deemed necessary or proper for its procedure as such court as aforesaid.



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“31. Every person who shall be guilty of an infringement or violation of this chapter shall be liable therefor (in addition to any other penalty or punishment to which he may by law be subject) to an imprisonment for such time during the session of the legislature then being held, as may be determined by the House before whom such infringement or violation shall be inquired into. The [609] nature of the offence shall be succinctly and clearly stated and set forth on the face of any warrant issued for a commitment under this section.”

It should be mentioned that by an Act (Revised Statutes of Canada 49 Vict. c. 11) the Dominion Parliament had already conferred on themselves the privileges, immunities and powers of the House of Commons of the United Kingdom.

If it was within the powers of the Nova Scotia Legislature to enact the provisions contained in s. 20, and the privileges of the Nova Scotia Legislature are the same as those of the House of Commons of the United Kingdom as they existed at the date of the passing of the British North America Act, 1867, there can be no doubt that the House of Assembly had complete power to adjudicate that the respondent had been guilty of a breach of privilege and contempt and to punish that breach by imprisonment. The contempt complained of was a wilful disobedience to a lawful order of the House to attend.

The authorities summed up in *Burdett v. Abbot* (1), and followed in the case of *The Sheriff of Middlessex* (2), establish beyond all possibility of controversy the right of the House of Commons of the United Kingdom to protect itself against insult and violence by its own process without appealing to the ordinary courts of law and without having its process interfered with by those courts.

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(1) 14 East, 1.

(2) 11 Ad. & E. 273.

The respondent, however, argues that the Act of the provincial legislature which undoubtedly creates the jurisdiction and further indemnified members of it against any proceedings for their conduct or votes in the House by the ordinary courts of law is ultra vires.

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According to the decisions which have been given by this Board there is no doubt that the provincial legislature could not confer on itself the privileges of the House of Commons of the United Kingdom or the power to punish the breach of those privileges by imprisonment or committal for contempt without express authority from the Imperial Legislature. By s. 1 of 38 & 39 Vict. c. 38 which was substituted for s. 18 of the British North America Act, 1867, it was enacted that the privileges, immunities and powers to be held, enjoyed and [610] exercised by the Dominion House of Commons should be such as should be from time to time defined by the Act of Parliament of Canada, but so that any Act of the Parliament of Canada defining such privileges, immunities or powers should not confer any privileges, immunities or powers exceeding those at the passing of such Act held, enjoyed and exercised by the Commons House of Parliament of the United Kingdom and by the members thereof. There is no similar enactment in the British North America Act, 1867, relating to the House of Assembly of Nova Scotia and it was argued therefore that it was not the intention of the Imperial Parliament to confer such a power on that legislature. But it is to be observed that the House of Commons of Canada was a legislative body created for the first time by the British North America Act and it may have been thought expedient to make express provision for the privileges, immunities and powers of the body so created which was not necessary in the case of the existing Legislature of Nova Scotia. By s. 88 the constitution of the Legislature of the Province of Nova Scotia was



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subject to the provisions of the Act to continue as it existed at the union until altered by authority of the Act. It was therefore an existing legislature subject only to the provisions of the Act. By s. 5 of the Colonial Laws Validity Act (28 & 29 Vict. c. 63) it had at that time full power to make laws respecting its constitution, powers and procedure. It is difficult to see how this power was taken away from it and the power seems sufficient for the purpose.

Their Lordships are however of opinion that the British North America Act itself confers the power (if it did not already exist) to pass Acts for defining the powers and privileges of the provincial legislature. By s. 92 of that Act the provincial legislature may exclusively make laws in relation to matters coming within the classes of subjects enumerated (*inter alia*), the amendment from time to time of the constitution of the province, with but one exception, namely as regards the office of Lieutenant Governor.

It surely cannot be contended that the independence of the provincial legislature from outside interference, its protection, and the protection of its members from insult [611] while in the discharge of their duties, are not matters which may be classed as part of the constitution of the province, or that legislation on such matters would not be aptly and properly described as part of the constitutional law of the province.

It is further argued that the order which the respondent disobeyed was not a lawful order or one which he was under any obligation to obey. The argument seems to be that the original cause of complaint was a libel; that though the particular breach of the Act complained of was the disobedience to the orders of the House yet as those orders were issued in reference to a certain petition presented to the House the contents of which were alleged to be libellous and during the investigation of

the question who was responsible for its presentation, and as it must be assumed that a libel is a matter beyond the jurisdiction of the House to be inquired into, inasmuch as libel is a criminal offence and the criminal law is one of the matters reserved for the exclusive jurisdiction of the Dominion Parliament, the whole matter was ultra vires, and both the members who voted and the officers who carried out the orders of the House are responsible to an ordinary action at law.

Their Lordships are unable to acquiesce in any such contention. It is true that the criminal law is one of the subjects reserved by the British North America Act for the Dominion Parliament but that does not prevent an inquiry into and the punishment of an interference with the powers conferred upon the Provincial Legislatures by insult or violence. The legislature has none the less a right to prevent and punish obstruction to the business of legislation because the interference or obstruction is of a character which involves the commission of a criminal offence or brings the offender within reach of the criminal law. Neither in the House of Commons of the United Kingdom nor the Nova Scotia Assembly could a breach of the privileges of either body be regarded as subjects ordinarily included within that department of state government which is known as the criminal law.

The effort to drag such questions before the ordinary courts when assaults or libels have been in question in the British Houses of Legislature have been invariably [612]unsuccessful, and it may be observed that 1 Wm. & M., Sess. II., c. 2. s. 1, sub-s. 9, "That the freedom of speech and debates or proceedings in Parliament, ought not to be impeached or questioned in any court or place out of Parliament," is declaratory and not enacting.

Their Lordships are therefore of opinion that s. 20 of the provincial Act is not ultra vires and affords a defence

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to the action. It may be that ss. 30, 31 of the Provincial Act if construed literally and apart from their context would be ultra vires. Their Lordships are disposed to think that the House of Assembly could not constitute itself a Court of Record for the trial of criminal offences. But read in the light of the other sections of the Act, and and having regard to the subject matter with which the legislature was dealing, their Lordships think that those sections were merely intended to give to the House the powers of a Court of Record for the purpose of dealing with breaches of privilege and contempt by way of committal. If they mean more than this, or if it be taken as a power to try or punish criminal offences otherwise than as incident to the protection of members in their proceedings, s. 30 could not be supported.

It is to be observed that the case of *Barton v Taylor* (1), referred to by one of the learned judges below, is no authority in favour of the contention here. No statute was there relied upon, but the Legislative Assembly itself in that case had in pursuance of statutory powers adopted certain standing rules or orders for the orderly conduct of the business of the Assembly. The trespasses complained of were adjudged by this Board not to be justifiable under the standing orders. It was then sought to justify the acts in question as being within a power incident to or inherent in a Colonial Legislative Assembly. This Board refused to adopt that contention, but their Lordships expressly added:—

“They think it proper to add that they cannot agree with the opinion which seems to have been expressed by the Court below, that the powers conferred upon the Legislative Assembly by the Constitution Act do not enable the Assembly ‘to adopt from the Imperial Parliament, or to pass by its own authority, any standing order giving itself the power to punish an obstructing

member, or remove him from the chamber, for any longer period than the sitting during which the obstruction occurred.' This, of course, could not be done by the Assembly alone without the assent of the Governor. But their Lordships are of opinion that it might be done with the Governor's assent; and that the express powers given by the Constitution Act are not limited by the principles of common law applicable to those inherent powers which must be implied (without express grant) from mere necessity, according to the maxim, Quando lex aliquid concedit, concedere videtur et illud, sine quo res ipsa esse non potest. Their Lordships' affirmance of the judgment appealed from is founded on the view, not that this could not have been done, but that it was not done, and that nothing appears on the record which can give the resolution suspending the respondent a larger operation than that which the Court below has ascribed to it."

But independently of these considerations the provisions of s. 26 of the Act of the provincial legislature would in their Lordships' opinion form a complete answer to the action even if the act complained of had been in itself actionable. Their Lordships are here dealing with a civil action and they think it sufficient to say that the legislature could relieve members of the House from civil liability for acts done and words spoken in the House whether they could or could not do so from liability to a criminal prosecution.

No such question as that which arose in *Barton v. Taylor* (1) arises here. All these matters—the express enactment of the privileges of the House of Commons of the United Kingdom—the express power to deal with such acts by the Provincial Assembly — the express indemnity against any action at law for things done in the Provincial Parliament are all explicitly given and

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the only arguable question is that which their Lordships have dealt with, namely, whether it was within the power of the provincial legislature to make such laws.

For these reasons their Lordships will humbly recommend to Her Majesty that the judgment in this case should be reversed and judgment entered for the appellants here (the defendants below) with costs. The respondent must pay the costs of this appeal.

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JUDGMENTS IN SUPREME COURT OF NOVA SCOTIA.

[*Reported 26 Nova Scotia Reports, 55.*]

RITCHIE, J.:—

It is in my opinion within the power of the local legislature to enact that no civil action for damages shall be brought against any particular person or persons including members of the legislature.

In the proceedings against the plaintiff for contempt the House of Assembly was sitting as a court of record trying a matter within its jurisdiction, if the Act which gives it that power is within the power of the local legislature. In such case, upon well established principles, the members who were judges of that court cannot be sued for their proceedings in such judicial capacity.

If that part of the Act which makes the House of Assembly a court and gives it the jurisdiction to try contempt is ultra vires, then the proceedings took place before the House of Assembly sitting as such, and the defendants, the members of that House who took part in the proceedings are indemnified by sect. 26 of cap. 3 of the Revised Statutes which enacts that “no member of either House shall be liable to any civil action or prosecution, arrest, imprisonment, or damages by reason of any matter or thing brought by him by petition, bill, resolution, motion, or otherwise, or said by him before such House.”

[64] For these reasons the judgment should, in my opinion, be set aside and judgment entered for the defendants with costs.

WEATHERBE, J. :—

This is an action brought against the Honourable W. S. Fielding, Premier, and others, members of the Executive Government and House of Assembly of Nova Scotia in all 23 members—a majority—for votes given by them in the House.

The votes were given in the affirmative on resolutions for taking plaintiff into the custody of the serjeant-at-arms for refusing to obey an order of the House and for committing plaintiff to gaol for forty-eight hours for refusing to apologise.

These resolutions grew out of proceedings against plaintiff before the House of Assembly on account of his having presented a petition charging members during the session of the House with improper and most unworthy conduct.

I suppose there can be no doubt this petition was an insult to members and was intended to reflect on their conduct and was intended to influence members in voting to repeal an Act of the legislature.

If the proper proceedings had been taken it will be admitted that plaintiff could have been punished under undoubted and unimpeached clauses of cap. 3 of the Revised Statutes respecting the powers and privileges of the Houses of the legislature.

It is obvious that though the truth of the charges against members could have been investigated it could not have been inquired into by means of the petition which clearly was not intended as a means of investigation but was an indisputable violation of law to interfere with the action of the House which if followed up would interfere with the freedom of discussion and legislation.

Plaintiff on being summoned before the House attended and after investigation this resolution was passed by the House:—

“That this House while fully cognizant of its own authority, and [65] prepared to exercise it when necessary, does not deem the offence of Mr. Thomas of sufficient gravity to call for any exercise of such authority. That therefore David J. Thomas be reprimanded for his conduct, and that such reprimand be given by the reading of this resolution to him by Mr. Speaker.”

Plaintiff being within the precincts of the House in obedience to the summons of the Speaker at the time of the passage of the resolution refused to obey the order of the House to come to the Bar and in defiance of the direction of the members left the House.

Afterwards, to state the matter shortly, the resolutions were passed for his arrest, for the voting of which the action is brought.

The defence is made out unless some of the clauses of cap. 3 R. S. (5th Series) which have been impeached are ultra vires the provincial legislature to pass. There has been no decision on the points raised but some remarks of ministers of justice in political returns in blue books were referred to. I have long ago read some of them uttered fifteen or twenty years since. To the able men—the authors—they would sound very strange and crude in the light of subse-

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quent discussion and authoritative legal decisions respecting the distribution of powers of the Dominion and the Provinces.

It is not now pretended so far as I am aware and after a very exhaustive discussion of the various clauses of the Act before us that the House of Assembly has not power to imprison or otherwise punish for disobedience of its orders during the session.

Nor is it disputed that the provincial legislature has power to make a law to indemnify members against any action by reason of any proceedings of theirs in the Houses of the legislature.

Sect. 29 of cap. 3 enacts that certain things are prohibited and shall be deemed infringements of the chapter and by a subsequent clause—31—imprisonment is authorized as a punishment for infringement of the chapter.

There are eight sub-sections to clause 29 specifying what are [66] “infringements.” The first forbids “insults to, assaults or libels upon members of either House during the session of the legislature.” By the third sub-section the refusal of any person to obey a rule, order or resolution of the House is ordained an infringement of the chapter.

The only question as I understand the matter in this case is whether forbidding any one to libel a member of the House is not beyond the powers of the provincial legislature to pass.

The argument is that while that legislature may forbid anyone to insult a member resort must be had to the Dominion legislature to prevent libel because libel is a criminal matter. In other words it is contended that while the provincial legislature has exclusive power to deal with all subjects touching the constitution and organization of the provincial houses of legislature, the freedom of debate and decorum, and while it may pass laws to prevent obstructions to the business whenever it contemplates an obstruction which amounts to a crime the province is powerless to legislate. The province may punish a man for insulting the members but may not forbid an assault on members. I suppose the contention is that inasmuch as to the Dominion Parliament is assigned the duty of making laws relating to crimes, except the penalties to be imposed for breach of provincial Acts, it would be ultra vires the provincial legislature to forbid libel in every case directly or indirectly and therefore I understand the alleged difficulty to be that this being the case though the words of the indemnity Act are pretty clear it cannot be imagined that indemnity legislation would be resorted to to prevent the recovery of damages for votes given by members under a mistake of their powers.

I supposed this short answer would be sufficient to meet such an objection, namely, that the province having the undoubted power to prevent obstructions to the business of legislation could prevent everything that was an obstruction or interference as such whether that interference was so violent as to amount to criminal conduct or whether it was conduct less violent. Such legislation by [67] the Province I think is not an interference with Dominion legislative power dealing with and defining crime. It is not denied that the Dominion Parliament could make all insults criminal and all manner of acts which might constitute obstruction to the provincial legislature crimes.

I cannot help thinking it will be admitted that if the impeached clause of cap. 3 had said "Any person interfering with members while in the discharge of their duties by insulting, assaulting or otherwise obstructing them may be punished by order of the House for such obstruction" it would have been held within the power of the legislature to pass it.

In obstructing the business of the House if a stranger were to commit a serious crime, by the use of fire-arms for example, it does not follow I think that under provincial legislation he might not be restrained and removed and punished for the obstruction in addition to the punishment to be imposed for the violation of the Dominion law forbidding the use of fire-arms. There are two things to be dealt with, the insulting or obstructing of members in their business and violating the general statutes in relation to criminal matters.

If sect. 29 can be construed to signify power in the House to deal substantially with any charge of crime or try or punish for the same except as an incident of protecting the members in their proceedings—if it can be so construed to any extent it is ultra vires the provincial legislature. I need not say now that we have become familiar with these questions that an Act may be only in part ultra vires and that it may be construed nevertheless to operate to the extent of the power properly exercised under it.

An assault with the intent of influencing a member of the House constitutes an offence, not that the assault is the gist of the offence, but because of the animus towards forcing, or influencing, or intimidating a member.

If it be competent to protect members from insult while in the [68] discharge of their duties it will not avail the aggressor that the insult was conveyed by reflecting on him by means of a libel.

With the limitation suggested I think it ought to be admitted that cap. 3 is not ultra vires the provincial legislature.

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No doubt the insult or libel reflecting on a member aimed at is not intended to be created an offence except during the session and only an offence in so far as it interferes with the proper exercise of legislative action.

If these defendants are liable as a matter of fact they are liable for voting for arrest and detention as punishment for disobeying a resolution with respect to the proceedings of the House.

The plaintiff was not found to have committed the offence charged in the first instance and assuming the charge could not be maintained I am unable to follow the reasoning that even because the Act or a portion of the Act under which the proceedings began must be held *ultra vires* there was no jurisdiction to try that question and there was no power to pass resolutions as to where the plaintiff should stand and when he should leave during the proceedings.

It is not claimed to be *ultra vires* to make orders of this kind or to dismiss or modify the complaint in view of the powers conferred by the statute.

There may be therefore another view of this subject without refining too much. We are familiar with that class of cases where Courts have been held to have been without jurisdiction in giving the judgment attacked though such Courts were held to have had jurisdiction to enter upon the investigation which resulted in the wrong judgment. Assuming therefore the House of Assembly was wrong in coming to the conclusion that the plaintiff could be in any manner punished for his conduct in relation to the petition in the first instance it must be observed that the imprisonment complained of was not awarded as punishment for the substantive offence but for refusal to attend the House during the investigation. At any [69] rate if the tribunal had ordered his attendance on the occasion of his absenting himself for the purpose of dismissing the complaint against him for want of jurisdiction there can I think be no doubt he would be bound to attend and the contention now raised would in any view fall.

I am of opinion however that sect. 29 of cap. 3 is *intra vires* and that it would be a strained construction of the British North America Act to hold that the provincial legislature may not punish interference with the proceedings of that chamber because that interference took the shape and form of criminal conduct as defined by the general laws of the Dominion Parliament and therefore I think the House had jurisdiction over the plaintiff.

GRAHAM, E. J. :—

This is an action for damages for assault and imprisonment.

The plaintiff, who was the mayor of the town of Truro, during the session of 1892, presented a petition to the House of Assembly of the Province of Nova Scotia complaining of legislation which affected the salary of the recorder of the town who was also a member of the House.

On the 14th of April 1892, the House passed a resolution in the following terms :—

“Whereas David J. Thomas, of Truro, in the county of Colchester, with other persons, has caused to be published a libel reflecting on a number of members of this House, by having the same printed and delivered to a member of this House for the purpose of having the said libel read in or presented to this honourable House ;

“Therefore resolved that the said David J. Thomas of Truro, aforesaid, having caused the said libel reflecting on a member or members of this House to be printed and delivered to a member of this House for the purpose of being read in or presented to this honourable House is guilty of a breach of the privileges of this House.

“Ordered that the said David J. Thomas be summoned to attend at the Bar of this House on Monday, the 18th day of April instant, at the sitting of this House on that day.”

On the 18th of April, in obedience to the summons of the Speaker, [70] the plaintiff attended and obtained time until the 20th, and on the 20th, when he again appeared, he was ordered by the House to withdraw and remain in attendance. The House passed the following resolution :—

“That this House while fully cognizant of its own authority and prepared to exercise it when necessary, does not deem the offence of Mr. Thomas of sufficient gravity to call for any exercise of such authority. That therefore David J. Thomas be reprimanded for his conduct, and that such reprimand be given by the reading of this resolution to him by Mr. Speaker.”

This resolution was communicated to the plaintiff, but instead of coming to the Bar to receive the reprimand he went to Truro. The House thereupon passed the following resolution :—

“That on Thursday the 14th day of April instant, this House passed a certain resolution adjudging David J. Thomas of Truro, in the county of Colchester, guilty of having published a libel upon a member or members of this House during the session of the legislature ;

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"That the said David J. Thomas was ordered to appear at the Bar of the House on Monday, the 18th day of April instant ;

"That on the said 18th day of April the said David J. Thomas appeared at the Bar of the House in obedience to the said order, and asked that time be given him to make a statement to the House ;

"That the House thereupon ordered the said David J. Thomas to appear at the Bar of the House on Wednesday the 20th day of April instant ;

"That the said David J. Thomas appeared at the Bar of the House this day in obedience to the said order of the House, and made a statement respecting the said libel ; that after making such statement the said David J. Thomas was ordered by the House to withdraw and remain in attendance ;

"That the House thereupon proceeded to consider the statement of the said David J. Thomas, and came to a certain resolution thereon and in respect of the said libel ;

"That the Serjeant-at-Arms communicated the said order to the said David J. Thomas, and that the said David J. Thomas, in contempt of the House, refused to obey such order, and left the precincts of the House :

[71] "That the said David J. Thomas be taken into the custody of the Serjeant-at-Arms attending this House, and that Mr. Speaker do issue his warrant accordingly ;

"Which being put, and the House dividing thereon, there appeared for the motion, 25, and against the motion, 6.

"So it passed in the affirmative.

"Ordered accordingly."

He was brought in custody to the Bar when the following resolution was passed :—

"Whereas David J. Thomas, on Wednesday last, the 20th day of April instant, whilst in attendance on the House, was guilty of a contempt of the House, committed in the face of the House ;

"Resolved that the said David J. Thomas, for his said offence, be committed to the common gaol of the county of Halifax, in the city of Halifax for the space of forty-eight hours ;

"Provided however that in the event of this Legislature being prorogued prior to the expiration of said term of forty-eight hours, the said term of imprisonment shall on such prorogation forthwith terminate.

"That Mr. Speaker do forthwith issue his warrant accordingly and in the meantime the said David J. Thomas remain in the custody of the Serjeant-at-Arms."

The warrant under which he was imprisoned was in the following terms :—

"Province of Nova Scotia,

"House of Assembly.

"To Alfred F. Haliburton, Serjeant-at-Arms of the said House, and to Thomas Chambers, the keeper of the common gaol of the city and county of Halifax.

"Whereas David J. Thomas, of Truro, in the county of Colchester, was by resolution of the said House of Assembly, passed this day, adjudged guilty of a contempt of the said House committed in the face of the said House, and for said offence was adjudged to be committed to the common gaol of the county of Halifax in the city of Halifax, for the space of forty-eight hours, provided, however, that, in the event of the Legislature of Nova Scotia being prorogued prior to the expiration of said term of forty-eight hours, imprisonment should on such prorogation determine ;

"And whereas I, the undersigned Speaker of the House of Assembly was, by said resolution, directed to forthwith issue my warrant of commitment accordingly ;

[72] "These are, therefore, to command you, the said Alfred F. Haliburton, Serjeant-at-Arms, as aforesaid, to forthwith convey the said David J. Thomas unto the said common gaol of the county of Halifax in the city of Halifax, there to deliver him up unto the custody of the keeper thereof. and to command you, the said Thomas Chambers the said keeper, to receive and detain the said David J. Thomas into said gaol for the space of forty-eight hours provided however that, in the event of the Legislature of Nova Scotia being prorogued prior to the expiration of the said term of forty-eight hours, you shall, on such prorogation, forthwith discharge the said David J. Thomas, and for so doing this shall be your sufficient warrant.

"Given under my hand and seal at the city of Halifax in the county of Halifax, aforesaid, this 23rd day of April A.D. 1892.

"(Sgd.) MICHAEL J. POWER,

"Speaker of House of Assembly,

"Nova Scotia. (Seal)."

The defendants were concerned either as members of the House of Assembly voting for the resolutions or as officials with the carrying out of the resolutions.

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The plaintiff had a verdict for \$200 damages against all of the defendants except four, viz., Messrs. M. J. Power, the Speaker; Haliburton, the serjeant-at-arms; Chambers, the gaoler; and Nicholas Power, the police constable. The learned Judge at the trial ordered judgment to be entered for them by reason of an Indemnity Act specifically indemnifying them, passed by the Legislature after the transactions which formed the subject of this action.

It will thus be seen that the House of Assembly has :—

(1.) Attempted to adjudicate upon and punish for the crime of libel.

(2.) Punished the plaintiff in this case as for a contempt in not submitting to the sentence imposed by the House in respect to that crime.

Sect. 29 of cap. 3 purports to deal with libels, forgery, tampering with witnesses and other offences. Sect. 30 constitutes the House of Assembly a court and appoints its members [73] judges for adjudicating upon such crimes, and sect. 31 provides for the imprisonment of an offender.

In my opinion the British North America Act provides that crimes of this character, and the procedure in regard to them, shall be dealt with by the Parliament of Canada and that Parliament only. It has dealt with them. That excludes the provincial legislature from passing laws in regard to them.

While the provincial legislature may legislate in respect to its privileges I think it cannot seize the right to adjudicate upon a crime indictable at common law merely because that offence touches its privileges.

In the case of *Reg. v. Lawrence* (1) it appeared that the Provincial Legislature of Ontario, while legislating in regard to licenses and the enforcement of penalties for the infringement of the law, made a provision that any person who, on any prosecution under the Act, tampered with a witness or by money or threats induced him to absent himself or swear falsely should be guilty of an offence under the Act and liable to a penalty of fifty dollars.

It was held, affirming the judgment of Mr. Justice Gwynne, that this provision was ultra vires for the acts were criminal offences at common law and within the exclusive jurisdiction of the Dominion Legislature.

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(1) 43 U. C. Q. B. 164; ante, vol. 1, p. 742.

Harrison, C. J., at page 174 says :—

“It never could have been the design of the Imperial Legislature as manifested by the language which it has used in the B. N. A. Act to permit any legislative body, under pretence of exercising only its own exclusive legislative powers, to cover ground which in truth by the constitution belongs to another. The whole domain of crime and criminal procedure is the exclusive property of the Dominion Parliament, and to allow the Parliament of a province to declare that an act which by the general law is a crime triable and punishable as a crime, with the ordinary safeguards of the constitution affecting procedure as to crime, shall be something other or less than a crime, and so triable before and punishable by magistrates as if not a crime, would be destructive of the checks provided by the general law for the constitutional liberty of the subject.”

I also think that it was the intention of the British North America Act that crimes of this nature should be tried by judges appointed and paid by the federal authorities and not by appointees of the Provincial Legislatures. That it is an usurpation of jurisdiction which if allowed in this case may be delegated to municipal bodies by the same Legislature: *Reg. v. Toland* (1) citing *Reg. v. Boucher*. (2)

If the legislation fails there was no power to try or to punish for libel and there is therefore no contempt in not submitting to the sentence. That an action will lie when the legislation is ultra vires and where there is no jurisdiction as a matter of law, see *Jonas v. Gilbert* (3) overruling 20 N. B. Reports 54 ; *Houlden v. Smith*. (4)

Then as to the contempt, sect. 29 provides that the refusal or failure of any member or officer of either house or other person to obey any rule, order, or resolution of such House shall be deemed an infringement of the Act. Sect. 31 provides that the nature of the offence shall be succinctly and clearly stated and set forth on the face of any warrant issued for a commitment under this section.

One of the learned counsel who so ably argued this case for the defendants contended that the section to which I have just referred did not apply. This was no doubt done with a view of bringing to his aid sect. 20 which then would have an

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(1) 22 Ont. Rep. 505.

(2) Cassels' Digest, 181.

(3) 5 Can. S. C. R. 356.

(4) 14 Q. B. 841.



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operation. That would get rid of any difficulty caused by the statute requiring the statement of an offence on the face of the warrant.

There seems to me to be a serious question involved in bringing into operation sect. 20, a general section, and, by inference, the powers of the English House of Commons to punish for contempt when there are specific provisions in respect to contempts contained in sects. 29, 30 and 31. Perhaps this depends upon whether or not [75] these sections are *intra vires*. However assuming the contention to be good I propose to deal with the power of the Provincial Legislature to confer upon the House of Assembly the power to punish by imprisonment for contempt. It is admitted that without legislation the House would have no such power.

In *Barton v. Taylor* (1) it is said: "It results from those authorities (2) that no powers of that kind are incident to or inherent in a Colonial Legislative Assembly (without express grant) except 'such as are necessary to the existence of such a body and the proper exercise of the functions which it is intended to execute.' (3) Whatever, in a reasonable sense, is necessary for these purposes, is impliedly granted whenever any such legislative body is established by competent authority. For these purposes, protective and self-defensive powers only, and not punitive, are necessary."

It is contended however that it is competent for the Provincial Legislature to pass an Act giving the House of Assembly such powers and that it has done so in the revised statutes of Nova Scotia cap. 3 sect. 20.

That section provides in general terms that the House of Assembly shall have the privileges, immunities and powers of the House of Commons of Canada. That House admittedly has the power to punish for contempt. It obtained the power to legislate in respect to this subject under an express provision in the British North America Act. Sect. 18 of that Act provides as follows:—

"The privileges, immunities, and powers to be held, enjoyed and exercised . . . by the House of Commons and by the members thereof . . . shall be such as are from time to time defined by Act of the Parliament of Canada, but so that the same shall never exceed those at the passing of this Act held, enjoyed

(1) 11 App. Cas. 197, 203.

(3) 4 Moo. P. C. 88.

(2) [*Kielly v. Carson*, 4 Moo. P. C. 63 and *Doyle v. Falconer*, L. R. 1 P. C. 328.]

and exercised by the Commons House of Parliament of the United Kingdom of Great Britain and Ireland, and by the members thereof."

No similar provision exists in that Act enabling the Provincial Legislature to define or create the privileges, immunities and powers of the House of Assembly. Where did it get the power?

[76] In *Bank of Toronto v. Lambe* (1) it is said:—"And it has been suggested that the Provincial Legislatures possess powers of legislation either inherent in them or dating from a time anterior to the Federation Act and not taken away by that Act . . . . They (their Lordships) adhere to the view which has always been taken by this Committee that the Federation Act exhausts the whole range of legislative power, and that whatever is not thereby given to the provincial legislatures rests with the parliament."

It was contended that this power to legislate so as to obtain power to punish for contempt was conferred by sect. 5 of the Colonial Laws Validity Act, passed in 1865 two years before the British North America Act. That provided that, "every representative legislature . . . . shall . . . . have full power to make laws respecting the constitution, powers and procedure of such legislature." If that is to be construed as conferring power to legislate in this way, then, while the Parliament of Canada may not by its legislation confer powers on the House of Commons of Canada exceeding the powers of the House of Commons of the United Kingdom, the provincial legislatures may do so. That construction ought not to prevail. The letter of that section does not I think enable the legislature to confer these powers upon the House of Assembly. But at any rate I think the specific provisions of the British North America Act upon the subject displace the application of that section. In the absence of any judicial decisions I think it is not at all out of place to attach weight to the opinions of three successive Ministers of Justice of the Dominion of Canada and also to that of two former law officers of the Crown in England denying the power of the provincial legislatures to enact such a provision.

Then reliance is placed by the defendants upon an indemnity clause, sect. 26. It provides that: "No member of either House shall be liable to any civil action or prosecution, arrest, imprisonment, or damages by reason of any matter or thing brought by him [77] by petition, bill, resolution, motion or otherwise, or said by him

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(1) 12 App. Cas. 575, 587; ante, vol. 4, pp. 7, 23.



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before such House, and the bringing of any such action or prosecution, the causing or effecting any such arrest or imprisonment and the awarding of any such damages shall be deemed violations of this chapter."

I think this section does not help the matter. If the legislature could not pass a law to enable the House of Assembly to punish a man for contempt, or to punish a man for not submitting to its sentence in a criminal matter, I think it could not get around the difficulty by passing an indemnity Act incorporating in the same Act a section indemnifying all of the members, if he was so punished at their instance. In other words this section is not to be construed as applying to such a case.

That section was no doubt passed to secure to members of the legislature freedom of speech. This was secured to members of the Imperial Parliament by the Bill of Rights, 1 Wm. & M. St. 2, c. 2. It has a very proper application in preventing actions and prosecutions against members for defamatory matter written or spoken in the legislature. Voting for legislation injurious to the rights of others would no doubt by this section be rendered remedyless in the courts. Indeed I can conceive that in legislative proceedings such a section should not have a strict construction. But having an application in that way I see no reason for extending it to members of the House of Assembly sitting in another capacity, viz: as a judicial tribunal and trying a person for a crime and punishing for contempt without possessing as I have endeavoured to show, power or jurisdiction. The Judicial Committee in *Doyle v. Falconer* (1) said:—"Again, there is no resemblance between a Colonial House of Assembly, being a body which has no judicial functions, and a court of justice, being a court of record." That a general section of that character will not be applied where there is nullity or want of jurisdiction, see Endlich on Statutes, s. 385.

In my opinion the defendants' motion to set aside the verdict should be dismissed with costs.

McDONALD, C. J., concurred.

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(1) L. R. 1 P. C. 328, 339.

MARTIN LYNCH (PLAINTIFF) ..... *Appellant*;

AND

THE CANADA NORTH-WEST LAND COM- } *Respondents.*  
PANY (DEFENDANTS) .....

THE RURAL MUNICIPALITY OF SOUTH } *Appellants*;  
DUFFERIN (DEFENDANTS) .....

AND

WILMOT F. MORDEN (PLAINTIFF) ..... *Respondent.*

WILLIAM T. GIBBINS (DEFENDANT) ..... *Appellant*;

AND

BARBARA L. BARBER (PLAINTIFF)..... *Respondent.*

*On Appeal from the Court of Queen's Bench of Manitoba.*

[*Reported 19 Can. S. C. R. 204.*]

*Interest—B. N. A. Act, s. 91, sub-s. 19—49 V. c. 52, s. 626, 50 V. c. 10, s. 43 (Man.).*

The matter of interest which the Dominion Parliament is empowered to deal with by virtue of sect. 91, sub-sect. 19 of the British North America Act is interest in connection with debts originating in contract.

The Municipal Act of Manitoba fixes certain times for the payment of taxes and provides that in case of non-payment at the times so fixed an addition of ten per cent. is to be made to the original amount of the tax :—

*Held*, reversing the judgment of the court below, Gwynne J. dissenting, that the ten per cent. so added was not “interest” within the meaning of sect. 91, sub-sect. 19 of the British North America Act, but constituted only an additional rate or tax by way

*\*Present :—RITCHIE O.J., and STRONG, TASCHEREAU, GWYNNE, and PATTERSON, JJ.*

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23;  
June 22.



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of penalty for non-payment which the local legislature, under its authority to legislate with respect to municipal institutions, had power to impose.

*Ross v. Torrance* (2 Legal News, 186 ; *ante*, vol. 2, p. 352) over-ruled.

APPEALS from decisions of the Court of Queen's Bench (Man.) (1)

The question raised on the three appeals is the same, [205] namely, as to the power of the legislature of Manitoba to pass an Act authorising municipalities to impose an addition of ten per cent. on taxes unpaid after a certain time from the assessment being made.

The Act in question is sect. 626 of the Act known as the Municipal Act of 1886, 49 Vict. c. 52, as amended by 50 Vict. c. 10, sect. 43. It provides that persons paying taxes before the first day of December in cities and the thirty-first day of December in rural municipalities shall be entitled to a reduction of ten per cent. ; taxes unpaid on those dates shall be payable at par until the first day of March following ; and if not then paid ten per cent. shall be added to the original amount.

The suit in Lynch's case was for specific performance of a contract for the sale of land by which the plaintiff agreed to pay the taxes assessed on the land and the balance of the purchase money in cash. In paying the taxes plaintiff paid the ten per cent. added on the amount on March 1st of each year and compounded in subsequent years and tendered to the defendant as the purchase money of the land the amount agreed less such taxes and interest. The defendant refused to accept this amount, claiming that the addition of the ten per cent. was illegal. The appellant refused to pay more and brought his suit for specific performance.

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(1) *Morden v. South Dufferin* 6 Man. L. R. 515 ; *post* p. 451.

The bill was dismissed without argument either on the hearing or before the full court, it being held that the case fell within the decision in *Morden v. South Dufferin* (1), which followed *Schultz v. City of Winnipeg*. (2) The defendant appealed.

In *South Dufferin v. Morden* the taxes imposed on respondent's land were subject to the addition of ten per cent., and respondent paid the addition under pro-[206] test having tendered to the appellants: first, the original amount of the tax imposed; and secondly, such amount with six per cent. added, both of which were refused. The action was brought to recover the amount added to the assessment and judgment was given against the municipality, the Act being held ultra vires so far as the addition to the tax was concerned. The municipality appealed.

In *Gibbins v. Barber* land was sold by the respondent to the appellant, the latter agreeing to pay taxes and deduct the same from the purchase money. The same question arises on a refusal by respondent to allow the ten per cent. addition to be so deducted.

The three appeals were argued together.

*Kennedy* for the appellants in *Lynch v. Canada North-West Land Co.* The interest mentioned in the British North America Act, as to which the Dominion Parliament only can legislate, is interest on commercial matters and means merely the rate of interest.

*Valin v. Langlois* (3) and *Citizens Insurance Co. v. Parsons* (4) settle the mode by which the B. N. A. Act

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(1) 6 Man. L. R. 515; *post*, p. 451.

(2) 6 Man. L. R. 35.

(3) 3 Can. S. O. R. 1; *ante* vol. 1, p. 167.

(4) 7 App. Cas. 96; 4 Can. S. O. R. 215; *ante*, vol. 1, p. 265.



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is to be construed. The whole scope and object of the Act is to be considered, and so construing it the word "interest" in sect. 91 cannot be held to apply to municipalities dealing with taxes.

The addition to the taxes provided for by the Manitoba Act is not interest but merely a penalty.

*Christopher Robinson, Q.C., and Tupper, Q.C.,* for the respondent. Interest is compensation for delay in the payment of money due. Tested by this definition the provision in this case clearly relates to interest and is ultra vires the provincial legislature.

The legislature in this same Act twice calls the addition to the taxes interest, which is some evidence of their intention in passing it.

The cases of *Ross v. Torrance* (1) and *City of Montreal* [207] v. *Perkins* (2) settle the law as we contend here.

In *South Dufferin v. Morden*, *Martin*, Attorney-General of Manitoba, appeared for the appellants and *MacTavish* for the respondent.

In *Gibbins v. Barber*, *Tupper, Q.C.*, for the respondent, stated that the counsel had agreed to submit the case on the factums, the facts being substantially the same as in the other cases.

The three cases were decided together and the following judgments were delivered.

RITCHIE, C.J.:—

It is obvious that the matter of interest which was intended to be dealt with by the Dominion Parliament was in connection with debts originating in contract,

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(1) 2 Legal News 186; ante, vol. 2, p. 352. (2) 2 Legal News 371.

and that it was never intended in any way to conflict with the right of the local legislature to deal with municipal institutions in the matter of assessments or taxation, either in the manner or extent to which the local legislature should authorize such assessments to be made, but the intention was to prevent individuals under certain circumstances from contracting for more than a certain rate of interest, and fixing a certain rate when interest was payable by law without a rate having been named.

R. S. C. c. 127, s. 1 provides :—" 1. Except as otherwise provided by this or by any other Act of the Parliament of Canada, any person may stipulate for, allow and exact, on any contract or agreement whatsoever, any rate of interest or discount which is agreed upon.

" 2. Whenever interest is payable by the agreement of parties or by law, and no rate is fixed by such agreement or by law, the rate of interest shall be six per centum per annum."

The statute then deals with the question of interest on monies secured on mortgage in sections from three to [208] eight inclusive. The three next sections apply to Ontario and Quebec, the next six to the Province of Nova Scotia, and the next six to the Province of New Brunswick, then four to British Columbia, and three to Prince Edward Island.

It is abundantly clear that taxes are not contracts between party and party either express or implied, but they are the positive acts of the government through its various agents binding upon the inhabitants, and to the making or enforcing of which their personal consent, individually, is not required.

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Dillon on Municipal Corporations (1) has the following note :—"Denying that taxes are debts, for which, without statute authority, actions may be maintained, see *Pierce v. Boston* (2) (and numerous other cases) . . . . In an important case in the Supreme Court of the United States, Justice Field states with clearness the distinction between 'taxes' and 'debts.' 'Taxes are not debts. It was so held by this court in the case of *Lane County v. Oregon*. (3) Debts are obligations for the payment of money founded upon contract express or implied. Taxes are imposts levied for the support of the government, or for some special purpose authorized by it. The consent of the taxpayer is not necessary to their enforcement. They operate in invitum. Nor is their nature affected by the fact that in some States . . . . an action of debt may be instituted for their recovery. The form of procedure cannot change their character. *Augusta v. North* (4); *Camden v. Allen* (5); *Perry v. Washburn*. (6) Nor are they different when levied under writs of mandamus for the payment of judgments, and when levied for the same purpose by statute. The levy in the one case is as much by legislative authority as in the other.' *Meriwether v. Garrett*. (7) In *Dubuque v. Ill. Cent. Ry. Co.* (8) the text, sect. 815 (653) is quoted with approval and numerous cases are cited by the learned judge including *The Dollar Sav. Bank v. United States*. (9)" *Meriwether v. Garrett* (7).

Field, J.:—

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"Municipal corporations are mere instrumentalities of the State for the more convenient administration of local

(1) 4 ed. vol. 2, p. 995.

(2) 3 Met. 520.

(3) 7 Wall. 71.

(4) 57 Me. 392.

(5) 26 N. J. L. 398.

(6) 20 Cal. 318.

(7) 102 U. S. 472, 513.

(8) 39 Iowa 56, 74.

(9) 19 Wall. 227.

government. Their powers are such as the legislature may confer, and these may be enlarged, abridged, or entirely withdrawn at its pleasure. This is common learning, found in all adjudications on the subject of municipal bodies and repeated by text-writers.

"The levying of taxes is not a judicial act. It has no elements of one. It is a high act of sovereignty, to be performed only by the legislature upon considerations of policy, necessity and the public welfare. In the distribution of the powers of government in this country into three departments the power of taxation falls to the legislative. It belongs to that department to determine what measures shall be taken for the public welfare, and to provide the revenue for the support and due administration of the government throughout the State and in all its subdivisions. Having the sole power to authorize the tax it must equally possess the sole power to prescribe the means by which the tax shall be collected, and to designate the officers through whom its will shall be enforced."

*City of Augusta v. North.* (1)

Appleton, C.J.:—

"But a tax duly assessed is not a debt. It is an impost levied by the authority of the state upon the citizens. There is no promise on their part to pay. The proceedings throughout are in invitum. A debt is a sum due by express or implied agreement. It was held in *Pierce v. Boston* (2), that taxes being neither judgments nor contracts, were not the subject of set-off.

"Nor are taxes (observes Shaw, C.J.) contracts between party and party either express or implied, but they are the positive acts of the government through its various

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(1) 57 Me. 39.

(2) 26 Verm. 482.



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agents, binding upon the inhabitants, and to the making and enforcing of which their personal consent, individually, is not required.”

In *Shaw v. Peckett* (1) it was held that the assessment of taxes did not create a debt that could be enforced by suit, or upon which a promise to pay interest could be implied. In *Lane County v. Oregon* (2) it was decided that the clauses in the several Acts of Congress of 1862 and 1863, making United States notes a legal tender for debts, had no reference to taxes imposed by state authority, the court holding that congress had in [210] contemplation “debts originating in contracts or demands carried into judgment, and only debts of this character.”

Chase, C.J., says in *Lane County v. Oregon* (3):—“The next case was that of the *City of Camden v. Allen*. (4) That was an action of debt brought to recover a tax by the municipality to which it was due. The language of the Supreme Court of New Jersey was still more explicit: ‘A tax, in its essential characteristics,’ said the court ‘is not a debt nor in the nature of a debt. A tax is an impost levied by authority of government upon its citizens, or subjects, for the support of the state. It is not founded on contract or agreement. It operates in invitum. A debt is a sum of money due by certain and express agreement. It originates in and is founded upon contracts express or implied.’

‘We cannot attribute to the legislature an intent to include taxes under the term debts without something more than appears in the Acts to shew that intention.

“The Supreme Court of California, in 1862, had the construction of these Acts under consideration in the case of

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(1) 3 Met. 520.

(2) 7 Wall. 71.

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(3) 7 Wall. 80.

(4) 2 Dutcher 398.

*Perry v. Washburn.* (1) The decisions which we have cited were referred to by Chief Justice Field, now holding a seat on this bench, and the very question we are now considering, 'what did Congress intend by the Act?' was answered in these words:—'Upon this question we are clear that it only intended by the terms debts, public and private, such obligations for the payment of money as are founded upon contract.' "

In the local legislature is vested the power to create municipal corporations and deal generally with municipal institutions, and to confer the right to impose or levy local rates, taxes and assessments upon the inhabitants and upon all property within the limits of the designated taxing district and to regulate the levying and collecting of such taxes in any manner it may deem most efficient. I care not by what name this ten per cent. may be called ; [211] it was to all intents and purposes, in the case before us, an additional tax as the words of the Act appear to me most unquestionably to indicate :

"All taxes remaining due and unpaid on the 1st or 31st day of December (as the case may be) shall be payable at par until the 1st day of March following at which time a list of all the taxes then remaining unpaid and due shall be prepared by the treasurer or collector (as the case may be) and the sum of ten per cent. on the original amount shall be added on all taxes then remaining unpaid."

What is this but an addition to the tax originally imposed? But we are asked to read this as not an additional tax but as interest for an indefinite period without the slightest indication of any such intention except the fact that ten per cent, is to be added to the tax, and

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thus producing the most unreasonable result that if the tax was paid the next day (say the 2nd day of March) the interest imposed would be ten per cent. for the forbearance of payment for one day, a proposition to my mind too unreasonable to suppose the legislature ever could have contemplated such a consequence. But treating it as an increased assessment, imposed to stimulate the ratepayers to pay promptly, and if they do not then approximately to equalize the assessment rendered necessary by reason of the delinquency of the ratepayers, no such difficulty arises. It may be too large or it may be too small for the accomplishment of either of these purposes, but with this we have nothing to do. The legislature has vested in the municipality the power to impose taxes, and if they have acted within the power confided to them no court has a right to say that the amount imposed is too large or too small. But had it been specifically named as interest I am of opinion that it was an incident to the right of taxation vested in the municipal authority and, though more than the rate allowed by the Dominion statute in matters of contract, in no way in [212] conflict with the authority secured to the Dominion Parliament over interest by the British North America Act, but must be read, consistently with that, as within the power given to the local legislature under its power to deal with municipal institutions.

As I said in the *City of Fredericton v. The Queen* (1), approved by the Privy Council in *Russell v. The Queen* (2), in reference to the Dominion Parliament, so with reference to the Local Legislature: "This general, absolute, uncontrolled authority to legislate in their discretion on all matters over which they have power to deal subject

(1) 3 Can. S.C.R. 505; *ante*,  
 vol. 2, p. 27.

(2) 7 App. Cas. 829; *ante*, vol. 2, p. 12.

only to such restrictions, if any, as are contained in the British North America Act and subject of course to the sovereign authority of the British Parliament."

In this case I can see no limitation with respect to municipal matters, which necessarily embrace the levying of taxes for municipal purposes and therefore falls within one of the classes of subjects enumerated in sect. 92, and assigned exclusively to the legislatures of the Provinces. Does not the collocation of number 19 "interest" with the classes of subjects as numbered 18 "bills of exchange," and 20 "legal tender" afford a strong indication that the interest referred to was connected in the mind of the legislature with regulations as to the rate of interest in mercantile transactions and other dealings and contracts between individuals; and not with taxation under municipal institutions and matters incident thereto? The present case does not deal directly or indirectly with matters of contract. The Dominion Act expressly deals with interest on contracts and agreements as the first section conclusively shews. The Chief Justice quotes, apparently with approval, the language of Mr. Justice Johnson in *Ross v. Torrance* (1) as follows:

[213] "If they can give the corporation of Montreal, by this mere changing the name of the thing, a legal right to ten per cent in the absence of an agreement between the parties, they can give it to the Bank of Montreal or to any other creditor they choose to designate and the plain provision of the constitution would become a dead letter."

In my opinion this is a non sequitur entirely unwarranted; limited as I have suggested no such result could possibly arise.

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(1) 4 Legal News 186; ante, vol. 2, p. 352.



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But it is alleged, as I have said, that it conflicts with the subject of interest secured by sect. 91 to the Dominion Parliament. But as was said in *Citizens Insurance Co. v. Parsons* (1): "The language of the two sections (91 and 92) must be read together, and that of one interpreted, and where necessary, modified by that of the other."

And again:—"The true nature and character of the legislation in the particular instance under discussion must always be determined, in order to ascertain the class of subject to which it really belongs." (2)

In the present case the legislature was not dealing or professing to deal with the question of interest but was dealing exclusively with taxation under municipal institutions, and the extra tax which the court below has chosen to call interest the legislature has not so denominated, but which the legislature imposed, no doubt, as I said before, as a means of securing payment, and also of approximately equalizing the rate between defaulters and those paying promptly. How can this be considered in any other light than as incidental to the power to levy the assessment as authorized by law, the principal matter of this Act being municipal taxation and not interest, and so prevent the defaulter from gaining an undue advantage over the ratepayer who pays promptly? And who more competent to apportion this than the local legislature, [214] and who more incompetent to deal with this purely municipal matter than the Dominion Parliament charged with the affairs affecting the peace, order and good government of the Dominion?

The British North America Act having given the power of legislation over direct taxation within the Provinces in order to the raising of a revenue for provincial purposes,

[ (1) 7 App. Cas. 96; ante, vol. 1, p. 265. (2) *Russell v. Reg.*, 7 App. Cas. p. 839; ante, vol. 2, p. 23 ]

and over municipal institutions in the Provinces, exclusively to the provincial legislatures, why should those bodies be restricted or limited as to the manner or extent to which those powers should be exercised? Why should they not be allowed to provide for the contingency of a failure to pay the taxes on the days and times fixed, and to make provision in such an event for an additional rate or tax, so that those failing to pay should be placed as nearly as may be on a footing with those who have paid promptly, equality being the rule dictated by justice and inherent in the very idea of a tax.

For these reasons I think the appeal should be allowed with costs in this court and in the court below.

STRONG and FOURNIER, JJ. concurred.

TASCHEREAU, J. :—

I am of opinion that sect. 626 of the Municipal Act imposes an addition of ten per cent. on unpaid taxes once for all and as a penalty. I would allow these appeals.

GWYNNE, J. :—

These cases all depend upon the construction of sect. 626 of the Manitoba Municipal Act, 49 Vict. c. 52, as amended by 50 Vict. c. 10, and they raise the question whether that section is, or is not, ultra vires of the provincial legislature. By sects. 602 and 603 of 49 Vict. c. 52, it was enacted that every municipality shall in each [215] year after the final revision of the assessment roll pass a by-law for levying a rate on all the property on the said roll liable to taxation, such rate to be levied equally on all the taxable property in the proportion of its value as determined by the assessment roll in force. Sect. 625 of 49 Vict. c. 52, as amended by sect. 42 of 50 Vict. c. 10, enacts that :—"The council of any municipality

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may by by-law make the taxes payable by instalments at such times as they may think proper and fix and allow a discount for prompt payment of such instalments."

By sect. 634 of 49 Vict. c. 52 :—"The taxes or rates imposed or levied for any year shall be considered to have been imposed and to be due on and from the first day of January of the then current year, and end with the thirty-first day of December thereof, unless otherwise expressly provided for by the enactment or by-law under which the same are directed to be levied."

The words "and end with the 31st day of December thereof" do not seem to have been inserted very aptly or grammatically, but what the section means, I apprehend, is that in whatever period of a year the taxes are in point of fact imposed they shall, for the purposes of the Act, be considered to have been imposed and due on the first day of January of that year, but cannot be levied by process of law until after the 31st day of December of that same year.

Then sect. 626 of 49 Vict. c. 52, as amended by sect. 43 of 50 Vict. c. 10, enacts that :—"In cities and towns all parties paying taxes to the treasurer or collector before the first day of December, and in rural municipalities before the thirty-first day of December, in the year they are levied shall be entitled to a reduction of ten per cent. on the same, and all taxes remaining due and unpaid on the first or thirty-first day of December, (as the case may be), shall be payable at par until the first day of March following, at which time a list of all the taxes then remaining unpaid and due shall be prepared by the treasurer or collector (as the case may be), and the sum of ten per cent. on the original amount shall be added on all taxes then remaining unpaid, and in cities a rate of  $\frac{1}{4}$  per cent. at the end of each month shall be added

[216] upon overdue taxes, the same to commence on the first day of January from and after the year in which the rate shall have been levied and accrued due, whether the said taxes are due upon the ordinary collector's roll or upon any special tax of any nature whatever, such as frontage tax for street improvements or any other tax collectable by cities."

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Then sect. 647 of 49 Vict. c. 52, enacts that:—"When interest is due and payable on taxes in arrear such interest may be added to the taxes and shall be considered to form part of the taxes so in arrear."

Now what the municipal authorities did in *Lynch v. N. W. Land Co.* and in *Municipality of South Dufferin v. Morden* (1), the lands there referred to being in rural municipalities, was this:—To the tax imposed for the year 1886, and which, as we have seen by the Act, was declared to have been due on and from the first day of January in that year, they upon the first day of March, 1887, added ten per cent., and upon the amount ascertained by the addition of these two sums with the tax imposed in 1887 they on the first of March, 1888, added other ten per cent. and so likewise on the first of March, 1889, upon the sum total of all the previous sums added together they added further ten per cent.

In the case of *Gibbins v. Barber*, the land rated being in the city of Winnipeg, what was done was that to the rate imposed in 1889 they on the first day of January, 1890, and on the first day of each month until and including the month of June, 1890, added  $\frac{3}{4}$  of one per cent. And the question is whether the imposition of these additional sums to the rates imposed by the municipalities was legal; that is to say, whether the sections of the Acts

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(1) 6 Man. L. R. 515; *post*, p. 451.



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purporting to authorize such additions to the imposed rates are *intra vires* of the provincial legislature.

It becomes necessary, therefore, to inquire under what item of sect. 92 of the British North America Act the sections objected to are to be ranked. The learned Attorney-General of the Province of Manitoba, who was the counsel for the appellant in the *Municipality of South Dufferin v. Morden* (1), repudiated all idea of the sections being attributed to, and of their having been passed under the authority of, any item other than that which enables the legislature of the Province to make laws in relation to municipal institutions in the Province. Upon the part of all the appellants it was insisted that the additional sums objected to were not and could not be regarded as being interest upon the rates imposed. Concurring with the learned judge, now Chief Justice of the Superior Court of the Province of Quebec, in *Ross v. Torrance* (2), I am of opinion that whatever name may be given to the charges they can be regarded in no other light than as sums charged by way of interest at the rate in rural municipalities of ten per cent. per annum for default in payment of the rates imposed within two months after the expiration of the year in which the tax is imposed, and so on at the same rate upon the whole sum from time to time remaining due on the first of March in each year until the land shall be sold for all arrears, thus charging ten per cent. compound interest per annum which is claimed as authorized by the above sect. 647, and in cities at the rate  $\frac{3}{4}$  of one per cent. per month commencing on the first day of January in the year next following that in which the tax was imposed and fell due,

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(1) 6 Man. L. R. 515; *post*, p. 451. (2) 2 Legal News 186; *ante*, vol. 2, p. 352.

that is to say, by the express terms of the Act, on the first day of January of the year in which it was imposed. That this  $\frac{3}{4}$  of one per cent. per month is charged by way of interest upon the rate imposed there can, I apprehend, be no doubt, and I can see nothing in the section to justify the construction that the ten per cent. added once in each year in rural municipalities should be regarded as [218] different in any respect in character from the monthly charge of  $\frac{3}{4}$  of one per cent. in cities, which would seem to have been considered about equivalent to ten per cent. per annum paid in one sum in each year until the land should be sold for the arrears. But that the sums so charged must be regarded as interest is, to my mind, clear from several sections of the original Act and of that passed in amendment of it. Upon the completion of the tax roll the rate imposed in each year became a debt due to the municipalities, and by sect. 623 a notice is required to be immediately served upon each person rated whose residence is known demanding payment of the rate imposed, which notice "shall mention the time when such taxes are required to be paid and when the percentages herein mentioned will be allowed and charged."

The rate imposed by the municipality is the only sum recoverable as tax; the "percentage" spoken of in the section is something deducted from or added to the tax as the case may be. Now the sect. 647 already quoted provides that "when interest is due and payable on taxes in arrear such interest may be added to the taxes and shall be considered to form part of the taxes so in arrear."

There does not appear to be anything in the Act which can come under the term "interest" as used in this section unless it be the percentages added as above. Then

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sect. 655 of 49 Vict. c. 52 as amended by sect. 48 of 50 Vict. c. 10 enacts that: "If the land when put up for sale will not sell for the full amount of arrears of taxes due and charges the said treasurer may then and there sell for any sum he can realize, and shall in such case accept such sum as full payment of such arrears of taxes; but the owner of any land so sold shall not be at liberty to redeem the same except upon payment to the treasurer of the full amount of taxes due together with the expense of sale with a sum equal to ten per centum thereof, and the treasurer shall account for the amount realized in such cases over and above all charges and the cost of publication, and in the event of redemption as aforesaid to the purchaser for the amount of his purchase money with twenty per centum thereon."

The ten per centum which upon redemption is thus added to the sum total of arrears of taxes calculated as directed by sect. 647, and the costs attending the sale is provided in identical language with that used as to the ten per centum added to the amount of tax imposed in each year, and sect. 652 clearly shews that this ten per centum added on redemption is interest upon the amount composed of taxes in arrear added to the cost of sale and nothing else, for it enacts that: "When two or more lots or parcels of land have been assessed together the same may be advertised and sold together, but the owner of any such lot or parcel may redeem the same within the time hereinafter provided upon payment of a proportionate part of the taxes and charges for which the said lots or parcels were sold together with a proportionate part of the interest required to be paid on the redemption of same."

Then in connection with this sect. 652 the 667th sect. provides for redemption of lands sold for non-payment of arrears of taxes, namely, that the owner, his heirs, etc.,

may at any time within two years from the date of sale redeem the estate sold by paying or tendering to the treasurer for the use and benefit of the purchaser or his legal representative the sum paid by him, and all sums, if any, paid by the purchaser for taxes thereon since the sale, together with a sum amounting to ten per centum thereof if redeemed at any time within one year, and if not so redeemed within one year then with the addition of a further and additional sum equal to ten per centum thereof, etc. Now these sums of ten per centum so added on redemption, and which are provided for in language similar to the ten per centum added to the rate imposed in each year, if not paid before the first of March in each [220] succeeding year, are what is spoken of in sect. 652, under the words "a proportionate part of the interest required to be paid in the redemption of same." Then sect. 672 of 49 Vict. c. 52 enacts that no deed executed upon a sale for arrears of taxes shall be invalid for any error or miscalculation in the amount of taxes or interest thereon in arrear. There is nothing in the Act to which the word "interest" as here used can apply unless it be to the said percentages added for default in payment of the taxes imposed at the time paid by the Act for that purpose in each year.

Then sect. 53 of 50 Vict. c. 10 enacts that all patented lands subject to taxation in any rural municipality shall be liable to be disposed of for "taxes, interest and charges" unpaid thereon up to the time of making up the list of lands so in arrears for the then current year which list the treasurer of every rural municipality is required to make as directed in the Act. The word "interest" as here used can apply only to the percentage added for default in payment of the rate imposed in each year within the time specified in the Act for that purpose as aforesaid. Then there are the sub-sections of this section which authorize the Government of the Province of Mani-

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toba to become speculator-general in the acquisition of all lands in rural municipalities liable to be sold for arrears of taxes.

Sub-sect. 2 requires the list required to be prepared by the treasurer to be advertised in a prescribed manner once a week for three consecutive weeks within two months preceding a day to be named in the advertisement, which advertisement, sub-sect. 3 provides, shall contain a notification that unless the arrears of taxes and costs are sooner paid the treasurer will proceed to the disposal of the said lands on a day named in the advertisement. Then sub-sect. 4 enacts that when interest is [221] due and payable on taxes in arrear such interest may be added to the taxes and shall be considered as part of the taxes in arrear. Then sub-sect. 6 enacts that on the day appointed in such notice the treasurer shall transmit a copy of such list authenticated by the seal of the municipality attested by the signature of the reeve, the clerk and treasurer thereof to the provincial treasurer with a statutory declaration as to the correct amount of arrears of taxes, interest and costs then remaining due upon each lot or parcel of land mentioned in the list, to which shall be annexed a certificate under the seal of the municipality to the effect, among other things, that the taxes, interest and costs therein mentioned are still due, wherefore the reeve and treasurer of the municipality did grant, bargain and surrender unto Her Majesty, Her heirs and successors, to and for the uses of the Province of Manitoba, all these certain parcels of land mentioned in the schedule thereunto annexed, and the sections then declare that such certificate shall have the effect of vesting absolutely all the lands in such schedule in Her Majesty to and for the uses of the Province of Manitoba. Then sub-sect. 7 enacts that upon the receipt by the provincial treasurer of such list, declaration and certificate the municipality shall be entitled to be paid the whole

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amount of arrears, interest and costs shewn therein as still due, owing and unpaid out of the consolidated revenue fund of the province. Then sect. 54 provides for the redemption of the several lands mentioned in the list by payment at any time within two years to the provincial treasurer of the sum paid by him to the municipality as taxes, interest and costs on such lands respectively, and all sums, if any, paid by the provincial treasurer under the Act since then, together with a sum amounting to ten per cent. thereof if redeemed within one year, and [222] if not so redeemed then with the addition of a further and additional sum equal to ten per centum thereof. Then sect. 57 enacts that: "In each year during the two years in which redemption of such lands may be effected as above provided, the Provincial Treasurer may pay out of the consolidated revenue fund of the province to the municipality in which such lands are situate, on the first day of May of each year, a sum equivalent to what the taxes, without interest, on said lands would have amounted to had they been held as private property and subject to taxation, and any amount so paid shall be included in the amount payable for the redemption of such lands and interest thereon as hereinbefore provided."

Now the amount which would have been due on the first of May in each year if the land had been held as private property would have been the tax imposed in the previous year with the ten per centum thereon added on the first of March following; this ten per centum is the only sum which can supply the word "interest" as there used, without which the municipality is compelled to accept payment from the provincial treasurer under this section, and the word "interest" as used in the last sentence of the section in connection with the words "thereon as hereinbefore provided" can mean nothing else than the sums of ten per centum by sect. 54 required to be paid in each of the two years within which the lands may



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be redeemed. In fine it is, I think, quite clear from the manner in which the word "interest" is used in all of the above sections of the Act that the percentages which the Act purports to authorize to be added to the original tax imposed in each year if not paid at or before the time specified in the Act for that purpose can be regarded in no other light than as interest charged for default in payment at the appointed time of the debt incurred by the imposition of the tax in each year. There is nothing in the clause of the British North America Act empowering provincial legislatures exclusively to make laws relating [223] to municipal institutions which requires the construction that the power assumed is authorized by that section. Municipal institutions as to taxes in arrear are creditors of the ratepayer by whom the tax is due, and if the power assumed exists in the case of municipal institutions in respect of a tax in arrear I can see no reason why it must not exist in the case of all creditors. The courts of the Province of Manitoba have, therefore, in my opinion, rightly held that the attempt to regulate the rate of interest which should be chargeable and recoverable by a particular creditor or a particular class of creditors against a particular debtor or particular class of debtors, for that and nothing else is what the section assailed, in my opinion, professes to do, is a usurpation of a power vested in the Dominion Parliament under the clause of the British North America Act which empowers that parliament to exercise exclusive legislative authority over the subject of interest.

I am of opinion, therefore, that the appeals in all three of the above cases should be dismissed with costs. The provincial legislatures can undoubtedly pass an Act authorizing the issue by the provincial Government of debentures payable with any rate of interest that may be agreed upon between the Government and its creditors or persons advancing money to the Government upon the secu-

urity of such debentures, for such an Act would be in the nature of a contract or legislative affirmation of a contract, and any rate of interest may be made payable by contract inter partes. But that is a case wholly different from the present.

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PATTERSON, J.:—

The respondents in these appeals maintain that a certain provision of a statute in Manitoba is ultra vires of the provincial legislature. The statute is 49 Vict. c. 52.

Sect. 626 of that statute, as amended by 50 Vict. c. 10, [224] sect. 43, holds out by way of inducement to the taxpayer to pay his taxes promptly the advantage of a reduction of the assessed amount if paid before a named day, and imposes, for the same reason, an increase on the assessed amount if not paid by another day which is mentioned.

If paid before the first day of December in cities and towns, or before the last day of December in rural municipalities, a deduction of ten per cent. is allowed. Between those dates and the first day of the following March the taxes are payable "at par," which means at the assessed amount. At the first of March a list of all the taxes then remaining unpaid and due is prepared by the treasurer or collector, and ten per cent. is added to the original amount of all taxes remaining unpaid. It is this addendum of ten per cent. that has been held to be unauthorized because it is considered to be interest on the assessed tax, and because "interest" is the designation given by sect. 91 of the British North America Act, 1867, to one of the classes of subjects assigned to the exclusive legislative authority of the parliament of Canada. The deduction of ten per cent. is not treated as objectionable. The offence against the constitutional Act is discovered only in the added ten per cent., yet it is not at once apparent why one is not as much an encroachment as the



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other. The Manitoba Act regulates the amount payable by each tax payer, according to the time he pays his taxes in the ratio of 90, 100 and 110. If the computation which raises the 100 to 110 is to be classed with "interest," as that word is used in article 19 of sect. 91, I do not see why the computation which raises the 90 to 100, or reduces the 100 to 90, escapes from the same class. It is pretty much the same thing whether you add a percentage and call it interest or deduct a percentage and call it discount.

[225] I have no idea that either process, as employed in the adjustment of the amount to be exacted under the enactment in question, is a subject of the class denoted by the word "interest" in article 19.

We find that article associated with others numbered from 14 to 21 (1), all of which relate to the regulation of the general commercial and financial system of the country at large. No. 19 is ejusdem generis with the others and does not, in my judgment, include the matter of merely provincial concern with which we are now dealing. This is a phase of the subject which it does not appear to me that we are required to consider exhaustively at present. Nor need we definitely decide whether the imposition in question, which is not a percentage accruing de die in diem, but is the same on the second day of March as a year later, or any length of time later, is properly called interest. It is not so called in the section by which it is imposed though it is referred to in some other sections by the name of interest. The use of the word in the Manitoba Act as a convenient name for the added percentage, or even as an appropriate name, is

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(1) "14, Currency and Coinage; 15, Banking, Incorporation of Banks, and the issue of Paper Money; 16, Savings Banks; 17, Weights and Measures; 18, Bills of Exchange and Promissory Notes; 19, Interest; 20, Legal Tender; 21, Bankruptcy and Insolvency."

of course, by no means conclusive of the thing so designated being interest within the meaning of that word as used in article 19 of sect. 91 of the British North America Act. We must see what the thing really is. It is clearly something which the Manitoba taxpayer who does not pay his taxes when due is made liable to pay as an addition to the amount originally assessed against him or his property. It is a direct tax within the Province in order to the raising of a revenue for provincial purposes, and as [226] such is indisputably within the legislative authority of the Province : B. N. A. Act, 1867, sect. 92, art. 2.

I agree with the members of the court who have expressed that view and I do not attempt to elaborate it. But the imposition may, not improperly, be regarded as a penalty for enforcing the law relating to municipal taxation, and in that character it comes directly under article 15 of sect. 92.

I am of opinion that the appeal should be allowed.

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JUDGMENTS IN MANITOBA COURT OF QUEEN'S BENCH IN SOUTH  
 DUFFERIN V. MORDEN.

[*Reported 6 Manitoba Rep. 515.*]

TAYLOR, C. J. :—

In *Schultz v. Winnipeg* (1), a decree was made restraining a tax sale on the ground that the defendants were proceeding to sell land, not for the taxes assessed upon it but for these taxes with, added



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thereto, the increase or penalty for default in payment, imposed by sect. 626 of 49 Vict. c. 52 as amended by 50 Vict. c. 10, s. 43. I then held that it is not within the power of the Local Legislature to impose, as it has done by that section, a rate of interest, where there is no contract, in excess of what has been fixed by the Dominion Parliament as the legal rate. The decree then made was, on a rehearing before the full Court, affirmed, although my brother Killam dissented from the other members of the Court upon the constitutional question, and concurred in affirming it for other reasons only.

I have seen no reason since the argument in this case, to change the opinion I then came to and expressed. I still hold that it was not within the power of the Local Legislature to impose the increase or penalty provided for by sect. 626.

[518] This sect. 626 being in this respect *ultra vires*, there is no increase or penalty fixed by law for default in payment of taxes, and a municipality is not entitled to add or charge six per cent or any other amount. Neither can the Court fix that rate, or any other rate as the proper one to be charged.

The giving a rebate for prompt payment does not seem open to objection. The provision for that, although contained in the same section as that which provides for the increase, is an entirely distinct one and may, I think, stand, although the other part falls.

The plaintiff is entitled to judgment on the first issue for \$6.82 and on the second issue for \$1.29 with his costs of suit.

KILLAM, J. :—

It appears to me that the decision of the majority of the Court in *Schultz v. Winnipeg* (1), is applicable, and that under it the additions of ten per cent were improperly demanded. This appears to me equally to involve the illegality of any attempt to impose interest at six per cent per annum. It is clear that upon the principles of the common law interest would not be chargeable upon such a rate without express authority for its addition. The addition of the ten per cent has been held invalid on the principle that any increase of the rate on account of its being allowed to become overdue

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(1) 6 Man. 35.

is "interest" within the 91st section of the British North America Act. Whether that be correct or not, the addition authorized is not interest accruing *de die in diem* at the rate of ten per cent per annum. It is an extra charge imposed at the expiration of a certain time, either once only, as claimed by the learned Attorney-General, or annually, but not until the date at which it may be made arrives. So that if taxes were paid the day before that date, no such extra amount would be chargeable. But "interest" as used in the Act respecting Interest, R.S.C. c. 127, would naturally be interest in the usual sense of the term accruing *de die in diem* and proportioned directly to the time during which the principal remains overdue.

That statute does not prohibit the imposition of any rate higher than six per cent per annum. It is enabling, not disabling. The provincial statute is in no respect inconsistent with it. The second section of the Dominion statute fixes six per cent as the rate only when interest is payable by agreement or by law, and no rate is fixed by agreement or by law. It does not make interest payable where [519] not otherwise payable by agreement or by law. The decision in *Schultz v. Winnipeg* (1), proceeded upon the view that the provincial legislature could not authorize the addition because, in doing so, it was legislating in relation to a matter coming within the class of subjects denominated "interest" in the British North America Act, sect. 91, sub-sect. 19, not because its legislation was inconsistent with a law of Canada prohibiting payment of interest or a rate of interest greater than six per cent per annum. There would, then, be no interest payable either by agreement or by law, and the Dominion Act could have no application.

Then, as to the discount claimed under the 626th section of the Municipal Act of 1886 as amended by the Act 50 Vict. c. 10, s. 43, I am of the opinion that the plaintiff was entitled thereto. In *Schultz v. Winnipeg*, (1), I suggested certain reasons why the municipalities would naturally require to secure payments of the municipal rates regularly and without great delay, and why the extra expense involved in the default of ratepayers should be thrown upon those occasioning it. But at any rate, there is no reason why

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the validity of the legislation of the provincial legislatures respecting municipal assessments should be judged by reference to the question of the rates being or not being imposed with absolute equality upon all ratepayers. These rates are payable by force of the provincial statute, and the municipalities can have no right to any greater amounts than the statute authorizes them to collect. Although the provision for a discount may seem to be an indirect method of accomplishing the same end as that authorizing the additional rate in respect of over-due taxes and thus to be trenching upon the subject of "interest," yet there is this distinction, that for an addition the authority of the legislature is necessary, but that in respect of the discount there is a qualification of the provisions authorizing the imposition of a general rate such that there is an absence of authority to charge more than the reduced amount before a certain date. I think, therefore, that I am not bound by the decision in *Schultz v. Winnipeg* (1), to hold that the municipality was entitled to the full amount levied, and that the reasons which I ventured to urge in that case apply with still greater force upon this point.

[520] In my opinion there should be judgment for the plaintiff for the two sums of \$6.82 and \$1.29 with costs.

BAIN, J. :—

As to the first question we are asked to decide on this special case it must be held, I think, following the decision of the Court in *Schultz v. Winnipeg* (1), that the sum of ten per cent which sect. 626 of the Municipal Act directs shall be added to the amount of all taxes remaining unpaid on the first of March, is interest, and that the provincial legislature had not jurisdiction to direct the addition of such a rate. Then if this provision of the section is invalid, there is nothing in the Act that authorizes the addition of a rate of six or any other per cent. The question whether a provision directing the addition of a rate of six per cent would have been valid or not, does not arise. I think that on the issue raised

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(1) 6 Man. 35.

by the first question, judgment should be entered for the plaintiff for \$6.82 and costs.

No reason was suggested on the argument, and none occurs to me, why the provision in this section that parties paying taxes before the day mentioned in the section, shall be entitled to a reduction of ten per cent on the amount of their taxes, should not be valid. On this issue I think judgment should be entered for the plaintiff for \$1 29 and costs.

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JOHN H. QUIRT AND OTHERS (DEFENDANTS) *Appellants* ;

AND

HER MAJESTY QUEEN VICTORIA (PLAINTIFF) *Respondent*.

*On Appeal from the Court of Appeal for Ontario.*

[*Reported 19 Can. S. C. R. 510.*]

*Banking and Incorporation of Banks—Bankruptcy and Insolvency—*  
*31 Vict. c. 17 (D.)—33 Vict. c. 40 (D.)—B. N. A. Act, s. 91,*  
*sub-ss. 15, 21.*

The power to legislate generally on the subject of bankruptcy and insolvency conferred on the Dominion Parliament includes the right to legislate specially for particular cases arising in connection with bankruptcy proceedings.

In 1866, the Bank of Upper Canada became insolvent, and assigned all its property and assets to trustees. In 1867 an Act was passed by the Dominion Parliament which assumed to incorporate the trustees, to amend the assignment and to give them authority to carry on the business of the bank so far as was necessary for winding up the same. Subsequently a further Act was passed by the Dominion Parliament assuming to transfer the property vested in the trustees to Her Majesty for the Dominion, and to confer all the powers of the trustees on the Governor-in-Council :—

*Held*, that these Acts were intra vires of the Dominion Parliament.

[511] APPEAL from a decision of the Court of Appeal for Ontario, sub nomine *The Queen v. The County of Wellington* (1) affirming the judgment of the Divisional Court (2) in favour of the Crown.

The suit in this case was brought by the Dominion Government to set aside certain conveyances among the defendants of a lot of land claimed by the Crown. The land originally belonged to the Bank of Upper Canada. In 1866 that bank transferred all its assets to trustees,

*Present* :—SIR W. J. RITCHIE, C. J. and STRONG, FOURNIER, TASCHEREAU, GWYNNE, and PATTERSON, J J.

(1) 17 App. Rep. 421 ; *post*, p. 469.

(2) 17 O. R. 615 ; *post*, p. 488.

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for the purpose of having them realized and the proceeds distributed pro rata among its creditors. In 1867, after confederation, the Dominion Parliament passed an Act ratifying this assignment and creating the trustees a corporation with power to carry on the business of the bank, so far as was necessary to wind it up. In 1870 another Dominion Act was passed transferring the bank assets to the Dominion Government as trustee to wind it up. In 1877, the land in question was sold to the defendant Anderson, who gave a mortgage for part of the purchase money, and covenanted to pay the taxes.

In 1886, the land was sold for taxes, Anderson having allowed them to fall into arrear. The defendant Cutten became the purchaser at the tax sale, and the defendant Quirt, at Anderson's instance, purchased the land from Cutten, and afterwards transferred it to Anderson's wife. The Crown brought a suit to have these conveyances set aside, and to have it declared that the land was still vested in the Crown, and that the Anderson mortgage remained a charge upon it. The defendant Cutten did not appear to defend the suit; the other defendants entered an appearance and defence.

At the trial the conveyances were set aside, on the [512] ground that the land being property of the Crown was exempt from taxation, and the tax sale was, therefore, void. The Divisional Court held that the tax sale was not void, but that the plaintiff's mortgage had priority over the other conveyances, and decided in favour of the Crown on that ground. The case was then taken to the Court of Appeal, where the judges were equally divided, and the judgment of the Divisional Court was sustained. Two of their Lordships in the Court of Appeal held the Dominion Acts above referred to ultra vires of the Dominion Parliament.

The defendants then appealed to the Supreme Court of Canada.



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*Bain*, Q. C. for the appellants.

The Acts of 1867 and 1870, or, at all events, the latter, were ultra vires. They are not Acts dealing with banking or the incorporation of banks. The Bank of Upper Canada had ceased to exist as a bank when these Acts were passed, and they simply dealt with the bank property which was held by the trustees under the assignment in 1866 as in the case of any other trust for creditors.

At all events the Act of 1870 is ultra vires. The trustees were not made a banking corporation by the Act of 1867, but were only to carry on the business for winding up the bank, so the Act of 1870 did not deal with a banking corporation.

Nor are the Acts valid as dealing with bankruptcy and insolvency. The power given to the Dominion Parliament is only to make general laws on these subjects: *L'Union St. Jacques de Montreal v. Belisle*. (1)

The learned counsel also referred to the following cases on this point: *Municipality of Cleveland v. Municipality of Melbourne* (2); *Colonial Building and Investment Association v. Attorney-General of Quebec* (3); *Citizens Insurance Co. v. Parsons*. (4)

[513] *Gamble* for the respondents.

The Dominion Acts are intra vires. The power to pass such Acts must exist somewhere and if not expressly given to the Provinces it must be in the Federal Parliament: *Valin v. Langlois* (5); *Leprohon v. City of Ottawa* (6); *Bank of Toronto v. Lambe*. (7)

(1) L. R. 6 P. C. 31; *ante*, vol. 1, p. 63.

(2) 4 Legal News 277; *ante*, vol. 2 p. 241.

(3) 9 App. Cas. 157; *ante*, vol. 3, p. 18.

(4) 7 App. Cas. 96; *ante*, vol. 1, p. 265.

(5) 5 App. Cas. 115; *ante*, vol. 1, p. 158.

(6) 40 U. C. Q. B. 488; 2 App. Rep. 522; *ante*, vol. 1, p. 592.

(7) 12 App. Cas. 575; *ante*, vol. 4, p. 7.

The courts will not presume that Parliament has exceeded its powers, but will strive to uphold the validity of the Act rather than to avoid it: *Edyar v. Central Bank* (1); *Valin v. Langlois*. (2) See also *Citizens Insurance Co. v. Parsons* (3); *McArthur v. Northern Junction Railway Co.* (4); *Cushing v. Dupuy*. (5)

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If the Acts were *intra vires* the land was vested in the Crown and could not be sold for taxes: B. N. A. Act, sect. 125; *Leprohon v. City of Ottawa*. (6)

[514] RITCHIE, C. J.:—

I cannot see how it can be contended that an Act for the settlement of the affairs of the Bank of Upper Canada, an insolvent institution, is *ultra vires* of the Parliament of Canada, to which body is confided the exclusive authority to deal with and legislate on banking, incorporation of banks, and bankruptcy and insolvency. If this is so, I think it equally clear that the Legislature of Ontario could pass no Act repealing, altering or interfering with the provisions of that Act, and so could not have passed an Act similar in its terms to the 33 Vict. c. 40, "An Act to vest in the Dominion for the purposes therein mentioned the property and powers now vested in the trustees of the Bank of Upper Canada."

Therefore it necessarily follows that the legislative power to do so belongs to the Dominion Parliament alone.

I think the contention that the lands, though vested in the Crown, were subject to taxation is equally untenable, and that the express exemption by R. S. O., 1887, c. 193, sect. 7, sub-sect. 1, of all property vested in or held by Her Majesty, or vested in any public body, body corporate,

(1) 15 App. Rep. 166; *ante*, vol. 4, p. 499.

(2) 5 App. Cas. 115; *ante*, vol. 1, p. 158.

(3) 7 App. Cas. 96; *ante*, vol. 1, p. 265.

(4) 17 App. Rep. 86; *ante*, vol. 4, p. 559.

(5) 5 App. Cas. 409; *ante*, vol. 1 p. 252.

(6) 40 U. C. Q. B. 478; 2 A Rep. 522; *ante*, vol. 1, p. 592.



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officer or person in trust for Her Majesty, or for the public uses of the Crown, is too clear to be got over, and is in no way affected or controlled by the exemption of lands vested in Her Majesty in trust for the Indians.

[515] I think, as suggested by Mr. Justice Street, that this is borne out by sect. 137, which enacts "that the taxes assessed on any land shall be a special lien on such land, having preference over any claim, lien, privilege, or incumbrance of any party, except the Crown."

I therefore think the enactment by the Dominion Parliament *intra vires* of that body, and the interest of the Crown being exempt from taxation this appeal should be dismissed.

STRONG, J.:—

This appeal, which was very ably argued at the bar, raises two important questions. The first of these involves the validity of the legislation of the Dominion Parliament relating to the winding up of the affairs and the distribution of the assets of the late Bank of Upper Canada embodied in the statutes of 1867 and 1870. The second question relates to the scope and construction of the provision in the Ontario Assessment Act, exempting lands and property of the Crown from taxation. If the judgment of the court below, deciding these two questions in favour of the Crown, is upheld, the other points raised become immaterial and need not be considered.

The first section of the Act of 1870 vests all the assets of the bank in the Crown, and the second section confers upon the Governor-General in Council the same powers of dealing with and realizing these assets as the assignees, under the prior Act of 1867, had possessed. Therefore, unless it can be demonstrated that this legislation was *ultra vires* of the Parliament of the Dominion, the Crown had full power to sell the lands in question to Anderson, and to take as security for the purchase money the

mortgage which it is the object of the present action to enforce.

I am of opinion that the statutes of 1867 and 1870 were in all respects *intra vires*, and that for the reasons [516] principally relied on by Mr. Justice Street in delivering the judgment of the Divisional Court, and by the Chief Justice and Mr. Justice Osler in the Court of Appeal. I rest this opinion, however, exclusively upon the 21st enumeration of sect. 91 of the British North America Act, and in no way upon the 15th which I do not consider applicable.

The 21st sub-sect. gives to Parliament the exclusive power to pass laws relating to bankruptcy and insolvency. That the Acts of Parliament in question come within the literal meaning of these terms appear to me very plain. The bank was insolvent, and the realization and distribution of its assets was a matter consequent upon that insolvency. The only reasonable ground upon which such enactments as these under consideration could be rejected from the category of bankruptcy and insolvency statutes, authorized by sect. 91, sub-sect. 21, would be that they were special and not general laws, and therefore were to be considered as assigned to the Provincial Legislature under the 16th clause of sect. 91, which authorizes legislation on matters of a local and private nature within the Province. The answer to this, however, is that any matter which comes within the terms of any of the subjects enumerated in sect. 91, although in other respects it might be classed under the head of local and private legislation, is expressly excepted from the powers of the Provincial Legislatures by the last clause of sect. 91, which enacts that "any matter coming within any of the classes of subjects enumerated in this section shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration of the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces."

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[517] Then, it is said that this class of legislation is appropriated to the Provinces under the head of property and civil rights. This argument, however, would prove too much since general legislation in matters of bankruptcy and insolvency, which sub-sect. 21 undoubtedly confers on the Dominion, must always be an interference with property.

Then, it can hardly be said that such special legislation as this, respecting a bank incorporated under the statutes of the Dominion, would be within the competence of a Provincial Legislature; the incongruity of such a construction, when we consider that the right to incorporate banks is exclusively in the Dominion, would alone be fatal to such contention, more especially as the Act of incorporation itself might well provide for the winding-up of a particular bank in case of insolvency.

If the special legislation regarding insolvency is *intra vires* of the Dominion in the case of a new bank, it is hard to see why it should not be so in the present case, of a bank incorporated and reduced to insolvency before confederation. Any distinction between the two cases would be purely arbitrary.

On the whole it seems to me that whilst there is no power in the Provinces to which these enactments could be reasonably referred, the Dominion Parliament does, according to the literal interpretation of the terms used, possess a power which includes them. For these and other reasons in which I concur, set forth in the opinions of the learned judges whose views prevailed in the courts below, it seems to me that this first objection to the judgment under review entirely fails.

As regards authority, I am of opinion that the case in the Privy Council of *L'Union St. Jacques de Montreal v. Bélisle* (1), so far from being an authority for the appellant, supports the conclusion I have reached. The Act of

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(1) L. R. 6 P. C. 31; *ante*, vol. 1, p. 63.

[518] the Quebec Legislature questioned in that case, was held to be *intra vires* upon the distinction expressly taken in the judgment that it was not an Act providing for a winding-up as in the case of bankruptcy or insolvency, but was rather an enactment designed for the purpose of avoiding such a result. I therefore consider the Privy Council as indicating that a special statute providing for the winding-up of an incorporated company would be bankruptcy or insolvency legislation.

[The remainder of the judgment is omitted as not bearing on the constitutional question.]

FOURNIER, J.:—

[519] Concurred in dismissing the appeal.

TASCHEREAU, J.:—

I am of opinion that this appeal should be dismissed, for the reasons given by Mr. Justice Patterson in his judgment.

GWYNNE J.:—

I have no doubt whatever that the Dominion Parliament had jurisdiction to pass these Acts.

PATTERSON, J.:—

When the British North America Act, 1867, took effect, the Bank of Upper Canada had forfeited its charter and all its privileges. That was the result of a provision contained in the Act of the Province of Canada (1) under which the bank had, from the first of January, 1857, held its corporate powers. By sect. 33 of that Act, a suspension of specie payments, if it extended to sixty days, operated as a forfeiture of the charter and of all and every [520] the privileges granted to the bank by that or any other Act. Specie payments were suspended on the 18th

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(1) 19 & 20 Vict. c. 121.



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of September, 1866, and were not resumed. During the sixty days, and therefore while the powers of the bank continued; the bank made an assignment to five trustees of all its property upon trusts declared in the deed.

At the first session of the Dominion Parliament an Act was passed (1) which confirmed the assignment, which is set out in a schedule, and declared it valid from the day of the date thereof; incorporated the trustees by the name of the Trustees of the Bank of Upper Canada; added certain special provisions to the provisions of the deed of assignment; and provided a shorter form for the registration of the deed of assignment in the counties where lands of the bank lay, in place of registering it in full as the registry law of Ontario required. The Act contained also the declaration, the validity of which is questioned, that the trustees as a corporation should have, hold and possess all the properties, estate and effects, real and personal, of the Bank of Upper Canada.

Then in 1870, another Act (2) declared that all the assets, etc., held by the trustees of the Bank of Upper Canada under the former Act, or acquired by them since the passing of that Act, should be and were thereby transferred to and vested in Her Majesty for the Dominion of Canada and the purposes of the Act.

The transfer of real estate in the Province from one person to another obviously falls within the subject of property and civil rights in the Province, which by sect. 92 of the British North America Act, 1867, is assigned to the exclusive legislative authority of the Province. The Acts are therefore invalid unless the subject falls also within one of the enumerated classes in sect. 91.

[521] It is argued that it falls within article 15, Banking, Incorporation of Banks, and the issue of Paper Money; or within article 21, Bankruptcy and Insolvency; or within both of those articles.

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(1) 31 Vict. c. 17.

(2) 33 Vict. c. 40.

In the Divisional Court (1), the decision in favour of the validity of the Acts was rested on article 21. In the Court of Appeal (2), two of the learned judges considered that both articles applied, or rather, if I correctly understand the opinions expressed, that either article 15 or article 21 was sufficient; while two judges held the Acts to be *ultra vires*.

It is remarked by one of the learned judges who held the Acts to be valid that the defendants, when before the Court of Appeal, confined their attack to the Act of 1870, but the Act of 1867 was, in his opinion, material to be considered as showing the character of the legislation. I also am of opinion that the Act of 1867 cannot be left out of the discussion. It is in reality upon that Act that the objection is founded, because the Act of 1870 purports to vest in Her Majesty whatever the Act of 1867 vested in the corporate body called the trustees of the Bank of Upper Canada, and therefore unless the earlier Act was valid the later one had nothing to operate on.

I am unconvinced by the arguments advanced to bring the legislation within article 15. The trustees were not carrying on the business of banking, they were merely administering the assets of an insolvent bank whose powers were forfeited. The incorporation of the trustees was not the incorporation of a bank. And I do not consider that the legislative authority to make laws on the subject of banking or to incorporate banks so far overrides the power conferred expressly upon the Provinces [522] to make laws in relation to property and civil rights in the Province as to carry with it the power to establish a mode of dealing with real estate when a bank is concerned, or for that matter with chattel property either, differing from the provincial system. There is no incident of banking that requires that business to

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(1) 17 Ont. Rep. 615; *post*, p. 469. (2) 17 App. Rep. 421; *post*, p. 488.



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be put on a different footing in this particular from any other business. The judgment of the Judicial Committee in *Bank of Toronto v. Lambe* (1), delivered by Lord Hobhouse, may be usefully referred to as an exposition of the extent of this word "banking" in article 15.

I entirely agree with Mr. Justice Burton and Mr. Justice Maclellan in what they said in the Court of Appeal on the subject of article 15.

I cannot, however, adopt their conclusion respecting article 21. The words bankruptcy and insolvency in that article, no doubt point primarily to the enactment of a general bankrupt or insolvent law, as was well explained by Lord Selborne in delivering the judgment of the Judicial Committee in *L'Union St. Jacques de Montreal v. Bélisle* (2); but, as I think is conceded by the same judgment, a special Act for the winding-up of some particular company which was insolvent, and the distribution of its assets, would not be beyond the competency of the Dominion Parliament. It is at least doubtful if a Provincial Legislature could pass an Act of the kind without transgressing the limits of its authority, but that point does not now require to be definitely decided. It is easy to imagine cases arising in connection with bankruptcy proceedings under a general law where special legislation would be required, such for instance as the necessity for curing some irregularity so as to validate or remove doubts as to titles taken under the proceedings. There must be power to do this in one legislature or the [533] other, and I take it to be obvious that the power would be in the Dominion Legislature alone. Such legislation would be, like that now under consideration, special legislation addressed to an individual case, but it would not on that account be *ultra vires*. That seems to have

(1) 12 App. Cas. 575; *ante*, vol. 4, p. 7.

(2) L. R. 6 P. C. 31; *ante*, vol. 1, p. 63.

been the view of the Provincial Legislature when, at its first session, which was early in 1868, in passing a registry Act for the Province (1), it made an exceptional provision for the registration of the assignment, declaring that:—

“It shall not be necessary to register in full the deed of assignment from the Bank of Upper Canada to Thomas C. Street, etc., bearing date the 12th day of November, A.D. 1866, and confirmed by the Act of the Parliament of Canada passed in the 31st year of Her Majesty’s reign, . . . chapter 17, which shall be deemed validly registered in any county or city if registered in the manner provided in and by the said Act, or by a declaration under the corporate seal of the trustees of the Bank of Upper Canada in the form following.”

The forms given in both Acts contain the express statement that the lands are held by the trustees as a corporation under the Dominion Act.

Purchasers of lands from the trustees in the interval between March, 1868, when the provincial registry Act became law, and May, 1870, when the unsold lands were vested in the Crown, took their titles on the faith of this provincial recognition of the validity of the Dominion Act of 1867, thus recorded for their information in the registry books.

It is going very far to ask the courts to say at this distance of time, that the legislatures were both mistaken and that the title remained in Mr. Street and the four other gentlemen associated with him as grantees under the deed of assignment.

Now, holding, as I think it is imperative upon us to hold, that it was within the authority of the Dominion [524] Parliament to legislate in relation to the winding up of the affairs of this insolvent bank, whose powers had been forfeited, although the corporation was not extinct—*Brooke v. Bank of Upper Canada* (2)—we virtually decide the whole controversy.

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(1) 31 Vict. c. 20, s. 55. (2) 4 Pr. Rep. 162; 16 Grant 249; 17 Grant 301.



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The right to legislate concerning bankruptcy and insolvency includes the power to make a statutory conveyance of the estate to the person charged with the administration of it. That is so in every system which the Parliament may be supposed to have had in view in passing the Act of 1867. (1) It was so under the Insolvent Act of 1864, which was then in force in Ontario and Quebec. It was so under the Insolvent Acts of 1869 and 1875 subsequently passed by the Dominion Parliament. It was not under any misapprehension in this particular that the Provincial Parliament recognised the title of the corporate trustees.

The Act of 1870 must be judged on the same principle as the Act of 1867. It altered in some respects the scheme of the earlier Act for the winding-up of the affairs of the bank, but it still had that purpose in view. It is described in the title of another Act to which I am about to allude, as "respecting the settlement of the affairs of the Bank of Upper Canada." The administration of the estate was taken from the trustees and committed to the Governor in Council, and the estate itself was vested in Her Majesty, which measure was followed in the next year (2) by the appropriation of \$250,000 to pay off claims on the bank in anticipation of the realization of the assets. It is not for us to criticize the mode in which the legislature exercises its powers, and once we reach the conclusion that the authority to make laws in relation to bankruptcy and insolvency brought the [525] affairs of the bank, or, more properly, the winding-up of those affairs, within the scope of that authority, there no longer remains any reason for denying the validity of the statutory conveyance.

On the question of the liability of the lands vested in Her Majesty to taxation I have nothing new to advance.

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(1) 31 Vict. c. 17, s. 3, sub-s. 22.

(2) 34 Vict. c. 8.

I see no tenable ground for distinguishing them from Crown lands in general.

I agree that we should dismiss the appeal.

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JUDGMENTS IN ONTARIO COURT OF APPEAL.

[*Reported 17 App. Rep. 421.*]

HAGARTY, C. J.:—

I think it was within the power of the Dominion Parliament to pass any Act in substance to facilitate the winding up or settlement of the affairs of an insolvent bank.

When the two Acts in question were passed, there was no general winding-up Act in existence, and I consider they fell clearly within the general subject of "banking, incorporation of banks, and the issue of paper money."

The subject of "bankruptcy and insolvency" may be also referred to.

The 91st sect. of the British North America Act declares that the exclusive jurisdiction of Parliament extends to all matters coming within the classes of subjects next hereinafter enumerated.

I am unable to understand how any legislation as to the administration of the assets of a suspended bank—their collection and distribution—the payment of creditors and provisions as to shareholders [427] etc., etc., must not be held to be within such jurisdiction, and necessarily outside the jurisdiction of a Provincial Legislature.

The first Act of 1867 confirmed the trust deed, stating it to have been executed while the charter was in full force, adding several provisions to it (such as sect. 5, sub-sect. 1), to carry on or continue so much of the operations of the bank as may be necessary for the beneficial winding up of the same and with power to use the bank's name when necessary for the winding up; (sub-sect. 5) 'no dividend to be paid to creditors till sanctioned by the Governor in Council.

Power is also given to the Governor in Council to nominate trustees in certain cases.

Sub-sect. 16 reserves the rights of the Crown against the bank, or against trustees, or the estate, or the shareholders, and the shareholders' liabilities are to be unaffected.

The Act of 1870 recites the insolvency of the bank, and that in the interest of the Dominion, which was by far the largest creditor of the bank, and of all parties concerned, provision should be made for a more speedy disposal of the property, and for making a fair and equitable adjustment and settlement of the claims of creditors, and then the assets are transferred to Her Majesty, to be

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administered under the Governor in Council, who is empowered to make any abatement in the claim of the Dominion.

The Act of 1871 (34 Vict. c. 8), allowed an appropriation of \$250,000 to pay off claims on the bank, settled and adjusted under sect. 4 of the Act of 1870.

As already noticed there was no general winding-up Act in existence.

In the same session a general banking Act was passed : (34 Vict. c. 5). Sect. 57 declares that any suspension of specie payments for 90 days constitutes a bank insolvent, and operates as a forfeiture of the charter as to the issue of notes and the carrying on of other banking operations, the charter remaining in force only for the purpose of enabling the directors, or assignee, or other legal authority (if any be appointed in such manner as may by law be provided), to make calls and wind up the business.

Sect. 70 provided that the bank should be subject to such provisions of any general or special winding-up Act to be passed by Parliament, as may be declared to apply to banks, and no special Act which Parliament may deem it right to pass for winding up the affairs of the bank in case of its insolvency, shall be deemed an infringement of its rights or privileges conferred by its charter.

The first winding-up Act, 45 Vict. c. 23 (D.) 1882, is declared applicable to banks "which are insolvent or in process of being wound up either under a general or a special Act"

I refer to this later legislation merely to shew the apparent understanding of Parliament as to its powers to legislate as to insolvent banks.

I consider the legislation as regards the Bank of Upper Canada to be in the nature of special winding-up process, and that such legislation was *intra vires*, and ranging under the head of "banking and incorporation of banks," and that it was *ultra vires* of any Provincial Legislature.

It perhaps may be objected that such special legislation may be faulty. I hardly see this, where the special legislation is in reference to settling the affairs of an institution wholly the creation of Parliament, and wholly outside the creative powers of the Provinces.

The distribution of its assets—the peculiar liabilities of shareholders—the large claims of the general government—the advancement of moneys by Parliament to assist the liquidation—the power given to the Governor-General in Council to remit or vary the government claim—all point to the subject of "banking" as clearly as if it had not become unable to meet its engagements.

In 1868, the year after the first statute, the Ontario registry law, 31 Vict., c. 20, sect. 55 (O), permits the registration of the deed to the trustees of the suspended Bank of Upper Canada, confirmed by the Act of the Parliament of Canada, 31 Vict. c. 17, and gives [429] a form for registering shortly stating the assignment, and that the trustees held as a corporation under the Act of the Dominion.

As a matter of "banking and incorporation of banks," and also as a matter of "bankruptcy and insolvency," I am of opinion that the legislation was within the exclusive powers of the Dominion Parliament.

On the other points of the case I agree with the opinion of my brother Osler.

BURTON, J. A.:—

The point mainly insisted upon in the argument in this Court was that the Act of the Dominion Parliament transferring the lands in question from the trustees, in whom they had been vested under the assignment made by the Bank of Upper Canada for the benefit of creditors, was within the competency of that Parliament.

That legislation, it will be seen, took place very shortly after the confederation Act, and before those portions of that Act which relate to the distribution of legislative powers had received the consideration and attention which have subsequently been bestowed upon them. The question is undoubtedly of importance, not because a large amount of property has been sold and disposed of under the provisions of the Act, as no inconvenience is likely to result to purchasers, whatever may be the decision—partly by lapse of time and the titles being quieted by the Statute of Limitations, and partly by the fact that there is no one to initiate proceedings against them, but on the further ground that no doubt can exist that the government and legislature having power to deal with the question would, if necessary, pass such validating Acts as would confirm all such titles—but it is of the utmost importance that the lines of demarcation between the powers of the respective legislatures should be strictly drawn and defined.

Let us see then how matters stood at the time when the confederation Act came into operation.

[430] The bank, which had been in existence since 1819, had its charter renewed by an Act of the late Province of Canada, in 1856, which charter was to continue in force until 1870, its chief place or seat of business being at the city of Toronto.

It was inter alia provided by the charter that a suspension for 60 days of payment on demand in specie of the notes or bills of the bank should operate as and be a forfeiture of its charter.

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The bank suspended payment on the 18th of September, 1866, and, within the 60 days allowed by the charter for resumption, made an assignment for the benefit of creditors, and this assignment, so far as it could be confirmed, was confirmed at a special general meeting of shareholders.

The deed contains a recital of the bank being unable at present to meet their circulation and deposits, as well as their other indebtedness, in specie, although possessed of assets more than sufficient to pay all their liabilities, if properly managed and applied, and was acted upon by the trustees named in it, and was being carried out at the time of confederation, and if that deed offended against any of the provisions of the Act then in force in Upper Canada respecting fraudulent preferences by persons in insolvent circumstances, it could have been impeached by any creditor of the bank, and I apprehend that after confederation, that Act which still remained, and has subsequently been re-enacted with amendments, in force in Ontario, would have been the Act by which its validity or invalidity would have been ascertained—there being no law of bankruptcy or insolvency then in force relating to banks.

This then being the state of affairs, the Dominion Parliament on the 21st December, 1867, passed an Act, which, after reciting these facts, proceeded :

First, to confirm this deed of assignment ; then to make the trustees named in it a body corporate, and to vest the property in them.

[431] It then provided, that contrary to the law then prevailing in Ontario, it should not be necessary to register the deed, but it should be valid without registration, and if the trustees elected to register, they might do so in a certain form, and then proceeded to provide for the appointment of trustees from time to time.

Then followed certain special provisions, and the Act provided that where these provisions conflicted with any provision in the original deed, effect should be given to the former. It is not perhaps very easy to understand what the first of these provisions meant—seeing that the right of the bank to carry on the operations of the bank had ceased in 1866, and the provisions in the deed were ample to allow the trustees to extend the time for payment of any debts due to the bank.

Then they were authorized in the name of the bank to execute deeds, receipts, and other documents.

Most of the other provisions do not seem to me to be material, but by the fourteenth provision the rights of the creditors and shareholders are interfered with to a serious extent.

The original charter of the bank made no provision for winding up the affairs of the bank by an assignment, and so far as this Act supplied that deficiency by confirming the act of the board in making it, I apprehend that the Dominion Parliament was the proper body to pass that legislation, and this Act therefore does not seem to me to be open to objection.

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On the 12th of May, 1870,—that is to say about four months after the bank charter would, if there had been no previous forfeiture, have expired by effluxion of time,—the Dominion Parliament passed an Act, 33 Vict., c. 40, containing a recital somewhat at variance with that made in the deed of assignment, that the assets were ample, if properly managed, to pay all the liabilities, viz: declaring that they are wholly insufficient to meet the liabilities of the bank; and then proceeded to transfer and vest in Her Majesty, from the [432] 1st of August then next, all the assets and property of the bank held and possessed by the trustees under the deed in question, or acquired by them subsequently, and all the powers, authorities, rights and immunities vested in or conferred on the trustees were transferred to the Governor in Council, and many of the sections of the previous Act were repealed, and the Governor in Council was empowered to sell and dispose of the property, estate, and effects thereby vested in Her Majesty, either generally or to creditors in satisfaction of their claims, and generally to compromise and adjust all claims due to or payable by the bank.

The obligation to publish a balance sheet was annulled, and power was given to convey the property without affixing the great seal or any seal.

If this legislation is *intra vires*, it is claimed to be so either under sub-sect. 15, or sub-sect. 21 of sect. 91 of the British North America Act. The Court below, in holding that it was *intra vires*, placed their decision upon the latter of these, which relates to bankruptcy and insolvency. With the very greatest respect I am unable to see how it is warranted under either.

At the time of the passing of the later Act the charter had absolutely expired.

The laws which the Dominion has power to pass under sub-sect. 15 were laws relating to “banking, the incorporation of banks and the issue of paper money.”

The first and third of these, it is hardly necessary to say, can have no possible application or relevancy, and although it may be conceded that the Dominion had the power to re-grant a charter to this defunct institution, it had not the remotest idea of doing so.

Burton, J. A.



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Then as to the others—laws relating to “bankruptcy and insolvency.”

I do not enter into the question, somewhat discussed at the bar, as to whether the power given being general, the Dominion Parliament instead of passing a general law dealing with the subject of the administration of estates of persons who may become bankrupt [433] or insolvent, according to certain rules and definitions, including, as was remarked in *L'Union St. Jacques de Montreal v. Belisle* (1), “the conditions in which that law is to be brought into operation, and the effect of its operation” were empowered to pass a law affecting only a particular firm who were in embarrassed or insolvent circumstances and making a special bankruptcy law applicable to that particular firm. It is not necessary to speculate upon that question, as it is sufficient to say that such a contingency is to the utmost degree improbable, and no such legislation has been attempted in the present case.

There was no general law, either at the time of the assignment, or at the time of the passing of the Act, relating to bankruptcy or insolvency, and the bank being in embarrassed circumstances claimed to have the right, at common law, to make an assignment, being restricted, as they supposed, rightly or wrongly, only by the provision of the Act to which I have referred, prohibiting any such assignment if it contained any preferences of one creditor over another.

That assignment was made, and that was what was dealt with by Parliament in the Act of 1870.

If that Act be valid, I can imagine no case in which similar legislation would not be justified in the case of any partnership or firm or individual who have or has made an assignment for the benefit of their or his creditors. The fact that the embarrassed debtors happened to be a bank and the Dominion the largest creditor, cannot in my view make any difference under the circumstances which I have mentioned.

The property was transferred to trustees by an assignment made voluntarily. The validity of that assignment, in the absence of a bankruptcy law, had to be governed by the laws in force in the Province, being a question falling within the subject of property and civil rights, and not under any of the matters mentioned in sect. 91. As remarked by Mr. Blake, in a case recently before [434] this court, neither the general nor the local legislature can attract to “itself a jurisdiction in matters assigned exclusively to

(1) L. R. 6 P. C. 31; *ante*, vol. 1, p. 63.

the other power by the device of, in one case, enlarging, or, in the other, restricting the geographical area or conditions in respect of which it proposes to legislate."

Mr Justice Street in his judgment says: "the Act seems to contain the essential elements of insolvency legislation—it recites the insolvency, vests the estate of the insolvent in the Crown as trustee for the creditors, and provides for the realization thereof in order that the debts may be paid."

I quite agree with my learned brother, that if the case falls within the category of bankruptcy and insolvency, the Dominion Parliament can alone deal with it. The divergence of our views arises from my regarding this as not a case of that kind at all.

I pointed out in the case of *Edgar v. The Central Bank* (1), the distinction which, in my opinion, existed between that class of legislation, and legislation having for its object the securing of an equal distribution of the assets of a debtor in insolvent circumstances, where no bankruptcy law existed.

Although there was a difference of opinion in this court as to the effect of some of the clauses introduced by amendment to chapter 118 of the Revised Statutes of Ontario, 1877, being the Act respecting the fraudulent preference of creditors by persons in insolvent circumstances, we were unanimous in holding that the Act itself, as originally passed, was within the exclusive jurisdiction of the Legislature of the Province, as I think any legislation in reference to this assignment of the bank—with the sole exception to which I have referred, of the power to validate the act of the board in making it—was within the exclusive legislation of the Province. If, for instance, it offended against any of the provisions of chapter 118, that Provincial Legislature, and that alone, could validate it.

Whilst I am free to admit that the Dominion Parliament might, by a bankruptcy or winding-up Act, have declared that such an assignment [435] was an act of bankruptcy, under which a court of its creation might have proceeded to declare it liable to compulsory liquidation—they have not attempted to do so: on the contrary they have assumed to validate and confirm that assignment, have incorporated the trustees, and then by a subsequent enactment have assumed to transfer the property so vested under the deed, to Her Majesty, or in other words to the Dominion authorities. They have first interfered with the rights and remedies of the creditors against the trustees individually by giving them a corporate existence, and then by vesting the lands conveyed to them by the deed

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(1) 15 App. Rep. 166; *ante*, vol. 4, p. 499.



in the Sovereign, against whom—the better opinion would seem to be—the trusts could not be enforced.

But the legislation has no connection with bankruptcy and insolvency, as these terms are understood.

A suggestion has been made by one of my learned brothers that the case may be governed by the decision of the Privy Council in *Dobie v. The Temporalities Board*. (1) The point was not argued, and I think it will be found to have no application. It may be conceded at once that neither the Province of Ontario nor Quebec, nor both combined, could, if the bank had existed after confederation, have passed any legislation the effect of which would be to modify or repeal the provisions of the bank's charter.

The powers conferred by the British North America Act upon the Provincial Legislatures of Ontario and Quebec, to repeal and alter the statutes of the old Province of Canada, are made precisely co-extensive with the powers of direct legislation with which these bodies are invested by the other clauses of that Act.

The Province having no power to charter banks, can have no power to interfere with charters granted by the former Province, but the bank (and for this purpose it is immaterial whether it was before or since confederation) made an assignment for the benefit of creditors. How far the board, with the authority of a majority of the shareholders, could legally make such an assignment has been [436] much discussed, more especially in the courts of the United States, but as the Dominion Parliament might have provided for this in the original charter, they could, I think, as I have pointed out, grant the power, or confirm the act of the board, as was done by the Act of 1867; on the other hand, if that assignment had offended against the provisions of chapter 118, the legislature of the Province had alone power to cure such a defect. I quite agree that their having validated it, would not stand in the way of the Dominion Parliament stepping in and declaring it an act of bankruptcy; but the legislature having to deal with property and civil rights could alone transfer the property from one set of trustees to another.

For these reasons I am of opinion that this legislation was ultra vires.

[The remainder of the judgment is omitted as not bearing on the constitutional question.]

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The plaintiff's case is : (1) that as against the Crown, the land was not assessable, and therefore, that the tax sale is void ; (2) that even if the taxes were lawfully imposed, the sale was brought about by Anderson himself in fraud of the Crown in order to defeat his mortgage, and that his wife, Emily Anderson, in whose favour the defendant Quirt executed a declaration of trust, is really his nominee, and that he is still the beneficial owner, subject to the mortgage.

As far as I am concerned, I think the case turns upon the first point, in answer to which the defendants allege : (1) that the Dominion Statute of 1870, vesting the land in the Crown, was and is ultra vires the Parliament, so that the Crown, having acquired no title from the bank, and having none under the Act, could confer none upon Anderson, the result being that the land, as land already granted, always remained taxable ; (2) that even assuming the Crown's title good under the Act of 1870, yet that land so acquired or held as mortgagee, following a subsequent grant, being held merely as trustee for creditors of the bank, and not as ordinary public lands of the Crown are held, were and are taxable under the Assessment Act as lands of private persons are taxable.

The first question then is as to the title under which the Crown conveyed to Anderson.

[439] The Bank of Upper Canada was incorporated by the Act 59 Geo. III., c. 24, and the various Acts relating to it were afterwards amended and consolidated by an Act of the late Province of Canada, passed in 1856, being 19 & 20 Vict. c. 121. It then became, if it had not previously been, a corporation authorized to carry on a general banking business throughout the old Province of Canada, now constituting the Provinces of Ontario and Quebec, and, as is well known, its business was so carried on, though the head office was in Toronto.

The principal question involved in the case is of considerable importance, affecting as it does the title to the greater part of the lands which have been sold in the course of winding-up the affairs of the bank, and it is necessary to refer briefly to the main provisions of the two Acts of the Dominion Parliament under the authority or assumed authority of which this was done.

The first of these is 31 Vict. c. 17, passed December, 1867, in the first session of the 1st Parliament, and entitled an "Act for the settlement of the affairs of the Bank of Upper Canada."

The preamble of this Act recites that the bank on the 18th of September, 1866, suspended specie payments, and afterwards, on the

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12th of November, 1866, while its charter and powers were in full force, made an assignment, under its corporate seal, to certain trustees in the deed named ; that at a special meeting of the shareholders the deed was confirmed, and that the then trustees had requested that the deed should be confirmed and the trustees incorporated under the name of "The Trustees of the Bank of Upper Canada." The first section of the Act confirms the deed of assignment, which is set forth as a schedule to the Act. The second incorporates the trustees as in the deed and in the Act named and appointed by the name above mentioned, and enacts that they shall under that name hold all the estate of the bank, and have in their corporate capacity all the powers conferred upon them by the deed and by the Act. [440] Sect. 4 provides for the appointment and nomination of the trustees. The 5th sect. enacts that certain special provisions shall be added to those in the deed, to which effect shall be given whenever they clash with those in the deed. Those important to be noted are : Sub-sect. 1.—The trustees shall have power to carry on or continue so much of the operations of the bank as may be necessary for the beneficial winding up of the same. Sub-sect. 3.—To do or execute, in the name of the bank, or otherwise, all such other things as may be necessary for the winding up of the affairs of the bank and distributing its assets. Sub-sect. 5.—From time to time, with the sanction of the Governor in Council, to declare and pay dividends to creditors, ratably, and in proportion to their respective claims. Sub-sect. 6.—After payment in full of creditors, to pay, divide and apportion the remainder of the assets among shareholders, in proportion to their holdings. Sub-sect. 11.—provides for calling a meeting of the shareholders for the purpose of appointing a trustee to represent them. Sub-sect. 12.—At all meetings of shareholders, each holder is entitled to one vote for every share standing in his name. Sub-sect. 16.—Nothing in the Act is to affect the liability of shareholders or the rights of creditors against shareholders or the privilege of the Crown, or its rights or remedies against the bank or the shareholders.

Little appears to have been done in winding up the bank under this Act, and the Act of 1870, 33 Vict. c. 40, already referred to was passed. The preamble recited that the property and assets vested by the former Act in the trustees, were wholly insufficient to meet the liabilities of the bank, that but little progress had been made in the settlement of its affairs, and that it was expedient in the interest of the Dominion, the largest creditor, and of all parties concerned, that provision should be made for a more speedy disposal of its property and assets, and for making a fair and equi-

table adjustment and settlement of the claims of all the creditors.

Sect. 1 enacts that all the assets, etc., of the bank, held by the [441] trustee corporation under the former Act, shall be and are thereby vested in Her Majesty for the Dominion of Canada, and the purposes of the Act, upon and after the 1st of August, 1870, subject to the charges, incumbrances and equities to which they are then subject.

Sect. 2.—All the powers, authorities, rights, and immunities vested in or conferred on the trustee corporation by the former Act and schedule, are transferred to, conferred upon, and vested in the Governor in Council, and may be exercised by or through such officer as may be from time to time appointed, and Her Majesty's name is to be substituted for that of the trustees in all pending proceedings. Sect. 4 of the former Act as to the appointment of trustees, and all the sub-sections of sect. 5, except 1, 2, 3, 15 and 16 are repealed.

Sect. 4.—The Governor in Council has full power to dispose of and sell the properties and estates vested in Her Majesty and the Dominion, and all other creditors of the bank shall be entitled to share equally, pro rata, and in proportion to their respective claims in the estates and properties of the bank transferred to Her Majesty, and nothing in the Act is to derogate from or impair any authority or power vested in the trustee corporation, and thereby transferred to and vested in the Governor in Council.

Sect. 6 provides that any surplus of the assets is to be divided pro rata among the shareholders.

The defendants contend that the Act of 1870 is ultra vires, as an infringement upon that branch of the powers of the Provincial Legislature which relates to property and civil rights: British North America Act, sect. 92 (13); while the plaintiff upholds its validity under sect. 91, either as an Act coming within class 15, relating to banking and the incorporation of banks, or class 21, relating to bankruptcy and insolvency.

The Court below not expressing any opinion as to its being within the former class, have treated it as being clearly within the latter, and I entirely concur in that opinion.

The defendants confined their attack to the second Act only, that being the Act which professes to vest the property of the bank in Her Majesty, but in considering its objects and provisions, we have to look at the Act of 1867, as the powers to be exercised under the Act of 1870 are, in the main, having regard to its object, those which were conferred upon the trustee corporation by the former, and it is to be observed that the substantial ground of objection to

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the latter Act, viz. : that property is thereby taken out of the hands of one holder and transferred to another, is equally applicable to the earlier, which transferred the estate of the bank from the assignee under the assignment of November, 1866, to and vested it in the trustee corporation created by the Act.

The 91st sect. of the British North America Act enacts that the authority of Parliament shall extend to all matters coming within the classes of subjects enumerated in that section, and if we apply to the Act in question the comprehensive test which has been laid down for ascertaining within which section—91 or 92—it is to be taken to fall, and ask what is the true nature and character of the legislation thereby enacted, the answer appears to me to lie upon the surface. The Act deals with an insolvent bank, and the rights and liabilities of its shareholders ; it provides for carrying on its operations for a limited purpose, in the name of the bank or otherwise, and the object of the whole is the beneficial winding of it up as an insolvent institution. In one aspect it may be said to rest upon the power to legislate respecting banking and the incorporation of banks ; in another, upon that respecting bankruptcy and insolvency, although having regard to what is undoubtedly the object of the Act it may be treated as coming wholly within the latter subject. Special provisions of a nature analogous to those found in the Acts of 1867 and 1870, might, I think, have been incorporated with each bank charter, without exceeding the legislative power of Parliament. This is contemplated by sect. 70 of the Bank Act of 1871, 34 Vict. c. 5.

[443] I fail to see that the mere assignment to trustees for the benefit of creditors deprives Parliament of the right to legislate in respect of the bank as an insolvent institution, or in respect of the trustee corporation, by whose hand, as it were, under the authority of Parliament, the winding up had commenced. It has been argued that all legislation of this nature must be strictly of a general character, like the Winding-Up Act, which was subsequently passed, and that a special Act dealing with a particular institution is necessarily invalid.

In support of this proposition, the case of *L'Union St. Jacques de Montreal v. Bélisle* (1), was cited, but is very far from bearing it out. The point decided in that case is, that an Act of the Quebec Legislature for the relief of a local benefit society, then in a state of financial embarrassment was *intra vires*. How far the Judicial Committee was from deciding that such an Act as we are now deal-

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(1) L.R. 6 P. C. 31; *ante*, vol. 1, p. 63.

ing with would be within the competence of the Provincial Legislature may be seen from the concluding passage of the judgment :—  
 “The fact that this particular society appears upon the face of the provincial Act to have been in a state of embarrassment, and in such a financial condition that unless relieved by legislation it might have been likely to come to ruin, does not prove that it was in any legal sense within the category of insolvency. And in point of fact, the whole tendency of the Act is to keep it out of that category and not to bring it into it. The Act does not terminate the company, it does not propose a final distribution of the assets upon the footing of insolvency or bankruptcy—it does not wind it up. On the contrary it contemplates its going on, and possibly at some future time recovering its prosperity.”

If, as I think, it would not have been within the power of a Provincial Legislature to pass the Act of 1870, for the reason that it is in all essentials the very opposite of the Act described in the passage I have quoted, it is necessarily an Act dealing with a matter coming within one or other of the classes of subjects assigned to [444] Parliament, and as such is valid legislation. Some stress was laid upon minor provisions of the Acts, with regard to the execution and registration of instruments, as trenching upon the limits of local powers. These, however, are all incidental to the principal purpose of the Act, and at all events nothing has been shewn to turn upon them.

[The remainder of the judgment is omitted as not bearing on the constitutional question.]

MACLENNAN, J. A. :—

I have been unable to come to the conclusion that the land in question was legally vested in the Crown by the Acts of 1867 and 1870, relating to the Bank of Upper Canada.

The Acts incorporating this bank were consolidated in 1856, by 19 & 20 Vict. c. 121. By sect. 6 the chief place of business was fixed at Toronto, but it was authorized to open branches or agencies in other places in the Province, that is the old Province of Canada, comprising the present Provinces of Ontario and Quebec.

By sect. 33, a suspension of specie payments for sixty days was to operate as a forfeiture of its charter, and by sect. 45, the Act, and any other unrepealed Acts relating to the bank, were to remain in force until the first day of January, 1870, and from thence until the end of the then next session of the Parliament of the Province, and no longer.

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By sect. 137 of the British North America Act, the Parliament of Canada was substituted for the Parliament of the Province, for the purpose of the foregoing section 45.

The bank suspended specie payment on the 18th of September, [446] 1866, and never resumed ; but within sixty days afterwards, namely on the 12th of November, it made an assignment of all its property to five trustees, upon trust for sale and realization, and the payment of its debts, without priority or preference, and in case of a surplus to pay the same to the shareholders. The assignment contained a provision for change of trustees, and for the execution of such instruments as might be necessary to vest the property in the new trustees from time to time.

On the 21st of December, 1867, Parliament passed an Act, 31 Vict. c. 17, reciting the assignment, and that the trustees had applied for an Act confirming it, and incorporating them by the name of "The Trustees of the Bank of Upper Canada." The Act confirmed the assignment, incorporated the trustees by the proposed name, and authorized the corporation under that name to hold all the property of the bank and to exercise all the powers given by the deed to the trustees, and also the additional powers conferred by the Act.

Among the additional powers conferred were (1) to carry on or continue so much of the operations of the bank as might be necessary for the beneficial winding up thereof ; (2) to execute on behalf of the bank, and in their name as trustees, all instruments they might think necessary ; and (3) to do, in the name of the bank or otherwise, all things necessary for winding up the bank and distributing the assets. The Act also contains provisions for the perpetuation of the trustee corporation, by the election of trustees to fill vacancies by the shareholders of the bank.

On the same day a general banking Act, 31 Vict. c. 11, was passed, which extended the corporate powers of existing banks over the whole Dominion, but otherwise containing nothing material to the present question. On the 12th of May, 1870, being in the first session of the Parliament of Canada next after the first of January, 1870, were passed two Acts, one a general Act, 33 Vict. c. 11, relating to banking, but which contains nothing material to [447] be considered here, and the other 33 Vict. c. 40, an Act specially relating to the affairs of the Bank of Upper Canada.

This Act recites the Act of 1867 above referred to, that the assets were wholly insufficient to meet the liabilities, that little progress had been made in the settlement of the affairs of the bank, that the Dominion was the largest creditor, but had received no dividend,

and that it was expedient to provide for the more speedy and equitable settlement of its affairs, and it transferred to Her Majesty, on behalf of the Dominion, all the property held and possessed by the trustees upon and after the first of August, 1870, and declared that no registration of such transfer in any registry office nor any assignment, endorsement or transfer from the trustees should be necessary to give effect to it or for any purpose relating thereto. The Act also transferred to the Governor in Council all the powers which the Act of 1867 had conferred upon the trustees, so far as applicable.

In the year 1871, on the 14th of April, a new banking Act, 34 Vict. c. 5, was passed, which continued the charters of a number of named banks for a further period of ten years, but no mention is made therein of the Bank of Upper Canada, and so far as I have been able to discover, none of its provisions are in any way applicable to that bank.

On the same day, however, an Act (34 Vict. c. 8) was passed to amend the Act of 1870, 33 Vict. c. 40, by authorizing the Governor in Council to pay off claims against the Bank of Upper Canada to an amount not exceeding \$250,000.

The foregoing is all the legislation so far as I can perceive having any bearing on the present case, with the exception of sect. 55 of the Registry Act of the Province of Ontario, 31 Vict. c. 20, which makes special provision for the registration in the registry offices of Ontario, of the assignment of the 12th of November, 1866, as confirmed by Act of Parliament, 31 Vict. c. 17.

[448] The land in question in this case was the property of the Bank of Upper Canada when the assignment was made, and the question is, whether, by virtue of that assignment, and of the Acts above referred to, the title passed to Her Majesty.

It is quite clear, I think, that the title passed to the five trustees named in the assignment, for whatever question there might have been concerning the validity of the assignment as a method of settling the bank's affairs, there could be none as to its power to execute a conveyance of land so as to transfer the legal title thereof to the grantee.

The effect of the assignment, executed as it appears to have been by all parties, including some of the creditors, was to vest the land in question in the persons named, upon certain trusts for sale, and for the application of the proceeds, and I cannot see that the trust thus created was different from any similar trust created by a trading company or by a partnership firm or by a private person. There were five trustees, and they had property to administer.

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The trustees were not the bank. The bank was a thing apart from the trustees. The bank no longer had any property. The trustees had the property and the bank had no longer any interest in it, not even in the proceeds. The proceeds belonged to the creditors, and if there should be any surplus it was to go to the shareholders; but neither were the shareholders the bank. There was not even a resulting trust in favour of the bank, for no matter how large the surplus might turn out to be, it was all to go to the shareholders. Then the sixty days having elapsed without the resumption of specie payments, the charter became forfeited, and I take the effect of that to be that the powers of the bank as a corporation for the purpose of carrying on the business for which it was originally created, were lost and gone, although the corporation did not become wholly extinct so as to prejudice creditors in their remedies against shareholders, or to prevent actions being brought in its name to recover choses in action which had been assigned to the [449] trustees, as was held in *Brooke v. Bank of Upper Canada*. (1) But whatever remained of the bank as a corporation in my judgment it was a thing apart and distinct from the trustees, and from the trust which had been created by the assignment. That was the state of affairs on the 21st of December, 1867, when the Act of that date was passed by Parliament. If the assets of the trust had all been within the Province of Ontario, I think the trust would have been a matter of a merely local nature in the Province, and that Parliament could have had no power whatever to deal with it: British North America Act, sect. 92 (16). There is no evidence before us, or in the assignment, or in the statutes, that any of the assigned property was without the Province of Ontario, but I assume in favour of the legislation that such was the fact. If so, it may be that Parliament had power to create the trustees a corporation, for the purpose of administering a trust which was to be performed partly in one Province and partly in another.

Upon that I express no opinion, but whether it had or had not power to give corporate capacity to the trustees, it by no means follows that it had power to dispense with conveyance, and to vest the land in question by an act of legislation in the corporation so created. The incorporation of the trustees seems to be a fact immaterial to this question. It seems also to be immaterial that the incorporators were the existing trustees. The question of the validity of the Act would be the same, if instead of incorporating the existing trustees, the Act had appointed five or any other num-

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(1) 4 Pr. Rep. 162; 17 Grant 301.

ber of new persons to be trustees in place of the others. In my judgment it is clear that Parliament could not change the trustees under an assignment for creditors made by a private person or by a trading corporation, and vest the property in the new trustees so appointed, without conveyance ; nor do I think that the mere power to create a corporation for the purpose of such a trust would include the power to dispense with or change the mode of conveyance sanctioned by the law of the Province. That would be to interfere with the law of property and civil rights in the Province, and would, I think, be clearly beyond the power of Parliament.

In *Citizens Insurance Co. v. Parsons* (1), the following passage occurs in the judgment of the Judicial Committee of the Privy Council : “ It by no means follows . . . that because the Dominion Parliament has alone the right to create a corporation to carry on business throughout the Dominion that it alone has the right to regulate its contracts in each of the Provinces. Suppose the Dominion Parliament were to incorporate a company, with power, among other things to purchase and hold lands throughout Canada in mortmain, it could scarcely be contended if such a corporation were to carry on business in a Province where a law against holding land in mortmain prevailed (each Province having exclusive legislative power over ‘ property and civil rights in the Province ’) that it could hold land in that Province in contravention of the provincial legislation ; and if a company were incorporated for the sole purpose of purchasing and holding land in the Dominion, it might happen that it could do no business in any part of it, by reason of all the Provinces having passed Mortmain Acts, though the corporation would still exist and preserve its status as a corporate body. And so I think that even if Parliament could create a trust corporation to carry out the assignment of the Bank of Upper Canada, the trust being nothing but a matter of property and civil rights—a trust for the sale of property and the distribution of the proceeds—Parliament could not transfer the property by methods not authorized by the law of the Province, and the attempted transfer was therefore in my opinion ineffectual.

I think the same reasons apply to the Act of 1870, which assumed to transfer the trust estate to Her Majesty without surrender by deed, and to dispense with the mode of transfer recognised by the law of the Province.

It was contended, however, that because the property which was [451] the subject of the trust had been the property of a bank, that

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(1) 7 App. Cas. 96, 117 ; *ante*, vol. 1, pp. 265, 283.



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circumstance gave Parliament authority to enact the legislation by virtue of sect. 91 (15) of the British North America Act.

That section gives jurisdiction over banking and the incorporation of banks, but I am unable to see how it could in any way authorize the Acts in question. Parliament can make laws on the subject of banking, has exclusive power to regulate that kind of business, and it can also incorporate banks. But the Acts in question are not Acts on the subject of banking, or Acts regulating that kind of business, nor are they Acts incorporating a bank. When the Act of 1867 was passed, the bank's charter had been forfeited and the forfeiture was never removed. By the bank's charter, 19 & 20 Vict. c. 121, s. 45, as mentioned above, all the Acts under which it derived its corporate powers were to expire at the end of the session of Parliament of 1870. That session came to an end, and the charter was never renewed, and the corporate powers of the bank ceased to exist. Neither of the Acts professes to revive, or renew, or extend the powers which had then become extinct, both by forfeiture and effluxion of time: *Lindsay Petroleum Co. v. Hurd* (1), and *Lindsay Petroleum Co. v. Pardez*. (2) In my opinion, the effect of the assignment, which was never attacked or questioned in any way and which the Acts referred to indeed assume to confirm, was that the assigned property ceased to be the property of the bank and became the private property of the creditors, and of the shareholders in their private capacity. The bank could not recover it back, and, as I have pointed out, there was not even a resulting trust in its favour. Under these circumstances I am, with great deference, unable to see how it is possible to contend that Parliament could legislate upon this property by virtue of its legislative authority over banking and the incorporation of banks.

It is also contended that the Acts may be maintained under subsect. 21, as bankruptcy and insolvency legislation, and this is the [452] ground upon which the judgment in review is rested. I am unable, with great respect, to agree to this view. It is well settled, and I think no one ever doubted, that, as incidental to a general bankrupt or insolvent Act, Parliament could modify the law of property in any Province so far as might be necessary, and could declare that the property of a bankrupt or insolvent should pass to an assignee without conveyance. But I cannot regard the Acts in question as in any proper sense bankruptcy or insolvency Acts. There was at the time the Acts passed a general law of insolvency on the statute book, but it was not applicable to banks, and the

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(1) L. R. 5 P. C. 221.

(2) 22 Grant 18.

Acts do not profess to extend the provisions of the insolvent Act to the case. Neither is there anything in the Acts themselves, impressing them with that character. They do nothing more, as I have pointed out, than change the trustees, in the first instance by creating a corporation and transferring the trust property to it, and afterwards by substituting the Governor in Council, in the name of Her Majesty, for the trustee corporation, and assuming to transfer the property to Her Majesty.

I humbly think that the power of legislation over bankruptcy and insolvency which was intended to be conferred on the Dominion Parliament, was the same as had been exercised by the Imperial Parliament, and by the Provincial Legislatures, before confederation, namely, the passing of laws more or less general in their application, with proper courts and procedure, and machinery for carrying them into effect, and not Acts declaring a particular person, or firm, or corporation, bankrupt or insolvent, or putting their affairs into a course of liquidation. In England, for a long time before 1861, bankruptcy was confined to traders, but it applied to all traders, and by 1 & 2 Vict. c. 110, an insolvent Act was passed for the relief of non-traders, and that also was a general Act, and the winding-up Act is also general in its application to companies, and the same is true of the legislation in the old Province of Canada. I think the power to pass the kind of legislation effected by [453] the Acts in question, not general but dealing with particular cases, was not intended to be conferred upon the Dominion Parliament, but was intended to be given to the Legislatures of the Provinces as matters of property and civil rights, and matters of a merely local and private nature: sect. 92 (13) and (16). The result is, in my humble opinion, that the title to the property in question never passed out of the trustees in whom it was vested at the time of the passing of the Act of 1867, and that it was therefore assessable, and that the sale for taxes and the subsequent conveyance by the county treasurer, passed the title to the defendant Cutten: *Cushing v. Dupuy* (1); *Citizens Insurance Company v. Parsons* (2); *L'Union St. Jacques de Montreal v. Bélisle* (3); *Bank of Toronto v. Lambe* (4); *Valin v. Langlois*. (5)

[The remainder of the judgment is omitted as not bearing on the constitutional question.]

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| (1) 5 App. Cas. pp. 415, 416; <i>ante</i> ,<br>vol. 1, p. 258.           | (3) L. R. 6 P. C. pp. 36, 37; <i>ante</i> ,<br>vol. 1, pp. 69, 70, 71. |
| (2) 7 App. Cas. p. 111, 112, 113;<br><i>ante</i> , vol. 1, pp. 277, 279. | (4) 12 App. Cas. 575, 586; <i>ante</i> ,<br>vol. 4, pp. 7, 21.         |
| (5) 3 Can. S. C. R. 1; <i>ante</i> , vol. 1, p. 167.                     |                                                                        |

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## JUDGMENT OF THE QUEEN'S BENCH DIVISION.

[*Reported 17 Ont. Rep. 615.*]

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The judgment of the Court [FALCONBRIDGE and STREET, JJ.] was delivered by

STREET, J.:—

It was admitted at the trial that the lands in question had been patented and had become vested in the Bank of Upper Canada at the time of its failure; that the Crown, claiming them under cap. 40 of 33 Vict. of the Dominion, had sold them to the defendant John Anderson, who had made the mortgage back for \$1,701, balance of his purchase money.

Counsel for the defendants raised the question before us as to the power of the Dominion Parliament to pass the Act above mentioned, under which the Crown claims title, but we have not had the benefit of an argument upon the point. That Act recites the insolvency of the Bank of Upper Canada; that its assets are vested in trustees, who have made but little progress in the settlement of its affairs; that the Dominion of Canada is by far its largest creditor; and that it is expedient in the interest of all persons concerned that provision should be made for a more speedy winding-up of its affairs, and for making a fair and equitable adjustment and settlement of the claims of all the creditors of the bank; it then vests in Her Majesty, for the Dominion of Canada, all the property and assets of the bank, transfers to Her Majesty all the powers of the trustees [618] under the trust deed, and provides for the sale of the assets, the settlement of the claims of creditors, and the disposal of the surplus.

Sect. 91, sub-sects. 15 and 21, of the British North America Act, confers upon the Dominion Parliament exclusive legislative authority in regard to (15) banking, incorporation of banks, and the issue of paper money; (21) bankruptcy and insolvency; and counsel for the plaintiff argued that the validity of the Act in question might be supported under either of these sub-sections.

We prefer to consider it as having been passed under the authority of sub-sect. 21. Under that sub-section there is no doubt of the authority of the Dominion Parliament to pass a general insolvency law which should vest in the assignee the property of an insolvent

debtor in any Province of the Dominion to which it should be made applicable, because without such a power the authority to pass such a law would be useless. The right to pass a general law of the kind must also involve the power to pass a special law to meet a particular case; the Local Legislatures, having no power to deal with insolvency legislation at all, are debarred from passing either a general or special Act, and the right must, therefore, exist in the other Legislature. The Act which is questioned by the defendants seems to contain the essential elements of insolvency legislation; it recites the insolvency, vests the property of the insolvent estate in the Crown as trustee for the creditors, and provides for its realization in order that the debts may be paid. We are, therefore, of opinion that it was within the powers of the Dominion Parliament and that by it Her Majesty became owner of the lands in question.

[The remainder of the judgment is omitted as not bearing on the constitutional question.]

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June 7;  
Dec. 13.

## IN RE COUNTY COURTS OF BRITISH COLUMBIA.

[*Reported 21 Can. S.C.R. 446.*]

*Constitution of Provincial Courts—Con. Stat. B. C. cap. 25, s. 14—  
B. N. A. Act, s. 92, sub-s. 14.*

The British North America Act, in giving the Provincial Legislatures authority to make laws regarding the constitution, maintenance, and organization of provincial courts confers exclusive power to define the jurisdiction of the courts territorially as well as in other respects, and also to define the jurisdiction of the judges who constitute such courts.

SPECIAL CASE referred to the Supreme Court of Canada by the Governor-General in Council, pursuant to sect. 4 of cap. 25 of 54 & 55 Vict.

The special case referred was as follows :—

“Important questions affecting the jurisdiction of the judges of the several County Courts in British Columbia and the power of the Legislature of the Province to pass laws regarding the territorial jurisdiction of County Court judges as well as the constitutionality of certain legislation of the Parliament of Canada, having been raised on the hearing of a writ of error before the Supreme Court of British Columbia, in the case of Piel Ke-ark-an against Her Majesty the Queen (1) (cor. Sir Matthew Baillie Begbie, Chief Justice, and Justices Crease, McCreight, Walkem and Drake) the opinion of the Supreme Court of Canada is desired upon the following case :

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\**Present* :—STRONG, TASCHEREAU, GWYNNE, and PATTERSON, JJ. (Sir W. J. Ritchie, C.J., was present at the argument but died before judgment was delivered.)

(1) 2 B. C. Rep. 53 ; *post*, p. 498.

"1. By section 5 of the provincial statute, cap. 25 Consolidated Acts of B.C., the County Courts Act, the following provision is made :

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"A County Court shall be and is hereby established within and for the Cache Creek, Kamloops, Nicola Lake, Okanagan, and Rock Creek polling divisions of the electoral district of Yale, to be called the 'County Court of Yale,' having jurisdiction throughout the said polling divisions of the electoral district of Yale.

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"2. The polling divisions referred to in the said section were the divisions of the district of Yale for the purposes of provincial elections to the Legislative Assembly for the Province of British Columbia.

[448] "3. Section 7 of the same Act provides that a County Court shall be and is hereby established within and for the electoral district of Kootenay, to be called the 'County Court of Kootenay,' having jurisdiction throughout the electoral district of Kootenay.

"The electoral district of Kootenay referred to in the last quoted section was the electoral district for the purposes of elections for the Provincial Legislature.

"4. Section 12 of the same statute (cap. 25) enacts that 'each such court shall be holden before a judge, to be called and known by the name and style of the judge of the county Court of Yale, or the judge of the County Court of Kootenay,' as the case may be ; each such judge shall, from time to time, be nominated and appointed by the Governor-General of Canada.

"5. By section 14 of the last mentioned Act, as amended by 54 Vict. cap. 7, section 1, the 'County Court Amendment Act, 1891,' it is enacted that 'any County Court Judge appointed under this Act may act as County Court Judge in any other district upon the death, illness or unavoidable absence of, or at the request of, the judge of that district, and while so acting the said first mentioned judge shall possess all the powers and authorities of a



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County Court Judge in the said district ; provided, however, that the said judge so acting out of his district shall, immediately thereafter report in writing to the Provincial Secretary the fact of his so doing and the cause thereof.

“ By commission, under the great seal, dated the 19th of September, 1889, William Ward Spinks, Esquire, was appointed Judge of the County Court of Yale, and such commission is as follows :

[449]

(L.S.)

“ W. J. RITCHIE,  
 Deputy-Governor.

### CANADA.

“ Victoria, by the Grace of God, of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith, etc., etc.

“ To William Ward Spinks, of the town of Kamloops, in the Province of British Columbia, in our Dominion of Canada, Esquire, Barrister-at-Law, Greeting :

“ JNO. S. D. THOMPSON, } Know you that reposing  
 Attorney-General, } trust and confidence in your  
 Canada. } loyalty, integrity and ability

We have constituted and appointed and We do hereby constitute and appoint you the said William Ward Spinks to be a judge of the County Court of Yale, in the Province of British Columbia ;

“ To have, hold, exercise and enjoy the said office of Judge of the County Court of Yale, unto the said William Ward Spinks, with all and every the powers, rights, authority, privileges, profits, emoluments, and advantages unto the said office of right and by law appertaining, during good behaviour, and during your residence within the territory to which the jurisdiction of the said court extends, that is to say : the polling divisions of Cache Creek, Kamloops, Nicola Lake, Okanagan and Rock Creek, in the electoral district of Yale.

“ In testimony whereof, we have caused these our letters to be made patent and the Great Seal of Canada to be

hereunto affixed: Witness, the Honourable Sir William Johnston Ritchie, Knight, Deputy of our Right Trusty and well Beloved the Right Honourable Sir Frederick Arthur Stanley, Baron Stanley of Preston, in the county of Lancaster, in the Peerage of the United Kingdom; Knight Grand Cross of our most Honourable Order of the Bath, Governor-General of Canada; at our Government House, [450] in the city of Ottawa, this nineteenth day of September, in the year of our Lord one thousand eight hundred and eighty-nine and in the fifty-third year of Our Reign.

“ By command,

“ J. A. CHAPLEAU,

“ Secretary of State.

“ 7. By the ‘ Speedy Trials Act ’ (C.S. Can. cap. 175) as amended by 51 Vict. cap. 46, the expression ‘ judge ’ in the Province of British Columbia, was defined to mean the chief justice or a puisne judge of the Supreme Court, or a judge of a County Court; but by 51 Vict. cap. 47, this definition of a judge is repealed, and in lieu thereof it is provided that in the Province of British Columbia the expression ‘ judge ’ means and includes the chief justice or a puisne judge of the Supreme Court, or any judge of a County Court.

“ The Governor-General of Canada has not made any appointment of a judge for the county of Kootenay.

“ 8. By the Provincial Statute, 53 Vict., cap. 8, section 9, the County Courts Amendment Act, 1890, it is enacted as follows:

“ Until a County Court Judge of Kootenay is appointed the judge of the County Court of Yale shall act as and perform the duties of the County Court judge of Kootenay, and shall, while so acting, whether sitting in the County Court district of Kootenay or not, have, in respect of all actions, suits, matters, or proceedings being carried on in the County Court of Kootenay, all the powers and

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authorities that the judge of the County Court of Kootenay, if appointed and acting in the said district, would have possessed in respect of such actions; suits, matters and proceedings; and for the purpose of this Act, but not further, or otherwise, the several districts as defined by [451] sections 5 and 7 of the County Courts Act, over which the County Court of Yale, and the County Court of Kootenay, respectively, have jurisdiction, shall be united.

“9. By the Federal Statute, 54 & 55 Vict. cap. 28, the following provisions are made:

“(1) The jurisdiction of every County Court Judge shall extend and shall be deemed to have always extended to any additional territory annexed by the Provincial Legislature to the county or district for which he was or is appointed, to the same extent as if he were originally appointed for a county or district including such additional territory; provided that nothing in this section contained shall, in any way, affect any litigation now pending, in the course of which any question has been raised as to the jurisdiction of a judge beyond the limits of a county or district for which he was originally appointed.

“(2) It shall be competent for any County Court judge to hold any of the courts in any county or district in the province in which he is appointed, or to perform any other duty of a County Court judge in any such county or district, upon being required to do so by an order of the Governor in Council, made at the request of the Lieutenant-Governor of such province; and without any such order the judge of any County Court may perform any judicial duties in any county or district in the province on being requested so to do by the County Court judge to whom the duty for any reason belongs; and the judge so requested or required as aforesaid shall, while acting in pursuance of such requisition or request, be deemed to be a judge of the County Court of the county

or district in which he is so required or requested to act, and shall have all the powers of such judge.

“3. Any retired county court judge of a Province may [452] hold any court or perform any other duty of a County Court Judge in any county or district of the Province, on being authorized so to do by an order of the Governor in Council, made at the request of the Lieutenant-Governor of such Province; and such retired judge, while acting in pursuance of such order, shall be deemed to be a judge of the county or district in which he acts in pursuance of the order, and shall have all the powers of such judge.

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“The questions for the opinion of the Court are:—

“(1) Was section 14 of the said County Courts Act (C. S. of B. C., cap. 25, so amended as aforesaid) ultra vires of the Provincial Legislature, either in whole or in part?

“(2) Was section 9 of the said County Courts Amendment Act, 1890 (53 Vict. cap. 8) ultra vires either in whole or in part?

“If it shall be considered that the above sections, or either of them, apart from Dominion legislation, were ultra vires, either in whole or in part, does the Federal statute, 54 & 55 Vict. cap. 28, validate them, and to what extent?

“(3) Is the jurisdiction of a county court judge in British Columbia, when acting under the Speedy Trials Act, confined to the county to which his commission extends? Or

“(a) May he exercise jurisdiction under the Speedy Trials Act in other parts of the Province, and what is the proper interpretation to be put on the term ‘any judge



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of a county court' occurring in section (2)*a* and (5)  
Speedy Trials Act?

" Respectfully submitted,

" (Sgd.) JNO. S. THOMPSON,

" For Minister of Justice."

*Emilius Irving*, Q.C., for the Attorney-General of  
British Columbia.

*Sedgewick*, Q.C., for the Attorney-General of Canada.

STRONG, J.:—

[453] In answer to questions 1 and 2, I am of opinion that both sect. 14 of the County Courts Act (Con. Stats. of British Columbia, cap. 25) as amended by 54 Vict., c. 7, sect. 1 (the County Court Amendment Act, 1891), and sect. 9 of the County Courts Amendment Act, 1890 (53 Vict., cap. 8), were within the powers of the Legislature of British Columbia, and I am of opinion that they are so *intra vires* independently of any federal legislation.

My reasons for this opinion are that such legislation was a valid exercise of the power conferred upon the Provinces by sub-sect. 14 of sect. 92 of the British North America Act, whereby provincial legislatures were empowered to make laws regarding the administration of justice in the Provinces including the constitution, maintenance and organization of Provincial Courts both of civil and criminal jurisdiction, and including civil procedure in those courts. The powers of the federal government respecting Provincial Courts are limited to the appointment and payment of the judges of those courts, and to the regulation of their procedure in criminal matters. The jurisdiction of Parliament to legislate as regards the jurisdiction of Provincial Courts is, I consider, excluded by sub-sect. 14 of sect. 92, before referred

to, inasmuch as the constitution, maintenance and organization of Provincial Courts plainly includes the power to define the jurisdiction of such courts territorially as well as in other respects. This seems to me too plain to require demonstration.

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Then if the jurisdiction of the courts is to be defined by the Provincial Legislatures, that must necessarily also involve the jurisdiction of the judges who constitute such courts.

If this were not so it would be necessary whenever [454] the territorial jurisdiction of a County Court was altered, or enlarged, that recourse should be had to federal legislation, under the general reserved powers of Parliament to sanction the change, or that the judges should be re-appointed by a new commission. I think it clear that Parliament in such a matter could not legislate without infringing the exclusive powers of the Provincial Legislature, and the notion that a new commission would be requisite in every case of an enlargement of the territorial jurisdiction of any of the courts in question, is too preposterous to be entertained. It must follow, therefore, that the whole power of legislating as regards the jurisdiction of Provincial Courts is restricted to the Provincial Legislatures.

I therefore answer the two first questions in the negative.

The expression "any judge of a County Court" in the Speedy Trials Act must, in my opinion, be taken to refer to any judge having by force of the provincial law regulating the constitution and organization of County Courts, jurisdiction in the particular locality in which he may hold a "speedy trial." This statute would not, I conceive, authorize a County Court Judge having no



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authority from the Provincial Legislature so to do, in holding a speedy trial without the limits of his territorial jurisdiction. This last conclusion necessarily results from the preceding observations. I may add that I do not regard the Dominion Statute, known as the Speedy Trials Act as a statute conferring jurisdiction, but rather as an exercise of the power of Parliament to regulate criminal procedure. This answers question 3.

TASCHEREAU, J. :—

I do not take part in this consultation. I have some doubts on the constitutionality of some of the enactments contained in the 54 & 55 Vict. Cap. 25, and on the [455] power of Parliament to make this Court an advisory board to the executive power or its officers, or, as it seems to me to have done in some instances by that statute, a court of original jurisdiction.

GWYNNE, J. :—

Concurred in the judgment of Mr. Justice Strong.

PATTERSON, J. :—

I also agree with Mr. Justice Strong, and scarcely understand how any doubt could have arisen among the judges in British Columbia.

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#### JUDGMENTS IN SUPREME COURT OF BRITISH COLUMBIA.

[*Reported 2 B. C. 53.*]

BEGBIE, C. J. :—

In this case the point is sufficiently raised in the writ of error, and the return and assignment of error annexed thereto, viz. : Whether Mr. Spinks had jurisdiction to sit and try the prisoner at Donald, in the County of Kootenay, by virtue of his commission, dated the 19th of September, 1889, and sect. 9 of the Provincial County Courts Act, 1890, and sect. 2 (a), sub-sect. (5), of the Speedy Trials Act, 1899, together or separately.

[59] As to sect. 9 of the provincial Act, it seems, so far as it seeks to extend the territorial limits of Mr. Spinks' jurisdiction, to be beyond the competency of the Local-Legislature. That legislature in 1883 constituted six County Courts, each with well defined territorial boundaries. One of these is to be styled (sect. 4) the County Court of Yale, having jurisdiction throughout the five polling divisions therein enumerated of the Electoral District of Yale; and another in sect. 7, to be called the County Court of Kootenay, having jurisdiction throughout the Electoral District of Kootenay. Each such court is (sect. 11) to have its own separate seal, bearing the name of the court, and is to be holden before a judge, to be called . . . . (sect. 12) "the Judge of the County Court of Yale," . . . . "the Judge of the County Court of Kootenay," etc., respectively. This statute was repealed and re-enacted in the Consolidated Acts, 1888.

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By the British North America Act, 1867, sect. 96, "the Governor-General shall appoint the Judges of the Superior, District, and County Courts in each Province."

On the 16th April, 1889, the Speedy Trials Act was amended by the Dominion Statute, 52 Vict. c. 47, and by sect. 2 (a), sub-sect. (5), "the expression 'Judge' means and includes," . . . . "in the Province of British Columbia the Chief Justice, or a Puisne Judge of the Supreme Court, or any Judge of a County Court."

At this time (19th April, 1889,) there were only two gentlemen commissioned as County Court Judges in the Province, viz.: the Judge of the County Court of Nanaimo, and the Judge of the County Court of Cariboo. But the Judges of the Supreme Court have long been authorized to act as County Court Judges in every district of British Columbia.

By the commission set out in the return to the writ, dated 19th September, 1889, Mr. Spinks was appointed to be judge of the said County Court of Yale, and the powers therein granted were thereby limited to be exercised by him while resident within the five polling divisions enumerated in the provincial statutes, which are again enumerated and expressly declared to constitute the extent (*i.e.*, the territorial extent) of his jurisdiction.

In 1890, there being no judge appointed to the County Court of Kootenay by the Governor-General, a provincial statute was passed, as mentioned in the assignment of errors, sect. 9 of which empowers the judge of the County Court of Yale, pending the



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[60] vacancy of the Kootenay County Court, to perform all the duties, and to have all the powers and authority, of a Kootenay County Court Judge ; and for the purpose of this Act the two districts were thereby united.

Now, the Provincial Legislature having, as it is not contested, lawfully in 1883 created two County Courts, viz : of Yale and Kootenay, might in 1890 just as lawfully have repealed that Act, and created one County Court extending over all the territory comprised in the two County Court Districts created in 1883. The effect might have been that the Yale Court would have become extinct. What would have been the position of the judge it is unnecessary to inquire ; but this seems clear, that he would not have been, without a fresh appointment by the Governor-General, the judge of the new County Court thus created. The Provincial Legislature would not, probably, have attempted in such a case to appoint the judge of the new court directly ; but this is just what sect. 9 attempts to do indirectly. For the repeal and extinction and new creation is by no means the object nor the effect of that sect. 9. The legislature by no means intend to extinguish the Kootenay County Court, which they had created in 1883. They carefully provide for its continuance, and expressly contemplate the appointment at some future time of a judge of that court (viz., by the Governor-General). They certainly abstain from appointing a Judge *eo nomine* ; but they confer upon Mr. Spinks, for the present, all the powers and authorities which a judge, if appointed (viz., by the Governor-General), would have had in the district. But the person who has all the powers and duties, all the authorities and jurisdiction of a judge, what is he but a judge ? He may also have some other designation ; a collector, a district magistrate, etc. He is nevertheless, the judge, and the sole judge for the time being in that court in which he presides ; and so the legislature evidently intends Mr. Spinks to be. It would be absurd to suppose that sect. 96 of the British North America Act could be defeated by the simple contrivance of calling the person invested with all the judicial powers and duties of the County Court Judge, a commissioner, or administrator, or by leaving him without any specific title whatever, as in the present case. The Provincial Legislature might with precisely the same propriety, and a similar infraction of the same sect. 96 of the British North America Act, appoint some person during the temporary inability or absence of the Lieutenant-Governor to exercise his powers and perform his duties, carefully abstaining from calling their nominee a " Lieutenant-Governor," or some person to perform the duties and exercise

[61] the jurisdiction of a judge of this court, so long as they did not call their appointee a "judge." Nor could these encroachments of the Provincial Legislature be validated by having received the Royal Assent, announced at the close of the session by the Lieutenant-Governor, nor could they be validated by an Act of the Dominion Parliament. It is sufficient to point out that the power of appointment having been placed where it is by an Act of the Imperial Parliament, nothing less than another Act of that Parliament can repeal or vary the arrangement.

I am, therefore, of opinion that Mr. Spinks derived no authority whatever from sect. 9 to exercise any judicial authority in the Court of Kootenay.

But a much more difficult question arises when we come to consider the Dominion Act, [52 Vict.] c. 47, s. 2 (a), sub-sect. 5, (The Speedy Trials Act,) defining that in British Columbia the Judge in a Speedy Trials Court may be "any Judge of a County Court." Mr. Spinks is undoubtedly a Judge of a County Court; and these words in their plain and simple sense, and if they stood alone, would undoubtedly seem to include him; and that is the sense in which a statute is always to be construed; loquitur ad vulgus, and it is not to be lightly frittered away by trivial or artificial distinctions. There must be some grave inconvenience, impropriety, or inconsistency, making it in the highest degree improbable that the legislature could have intended to use the particles "any" and "a" in the primary popular sense without any qualification, and there must also be some other construction or qualification reasonably near, and not obvious to any objection. And I think that the above objections are applicable here; and that the expression "any Judge of a County Court" must be limited by the tacit condition "within his county," or words to that effect.

I do not think that the Dominion Legislature could have meant to authorize a County Court Judge to act outside of the territorial jurisdiction (if any) mentioned in his commission, either expressly or impliedly. In the first place, to do so would be, I think, to infringe upon the prerogative reserved to the executive by sect. 96 of the B. N. A. Act almost as effectively, though not quite so boldly, as the provincial statute has done in sect. 9 of their statute of 1890. The executive says: "We empower Mr. Spinks by this commission to be County Court Judge of Yale, and invest him with all the statutory powers of such a Judge. As to the County Court [62] of Kootenay, we reserve our right of nominating the Judge there." This is according to sect. 96. It is surely an infraction of that section to make the Legislature say: "We do not care what

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limitations the Governor-General, by his commission, has placed upon Mr. Spinks, or any other County Court Judge, nor what jurisdiction or rights a future County Court Judge may have; the Courts we are now creating may be held before any County Court Judge in any part of British Columbia." Now while the doctrine in *Valin v. Langlois* (1) is undeniable, that the Dominion Legislature may impose new duties on the judges and courts whom it maintains, yet they must surely be duties compatible with those already imposed on those courts, and such as may be discharged by a County Court Judge without derogating from his special authorization. And the legislature must surely be taken to have respected all the terms of the commission which they invoke as a qualification for the new office they are creating. They cannot be supposed to have intended by mere general words to run counter to the express limitations of the commission, when those general words admit of a ready and obvious modification. Further, the construction of this sub-sect. 5 must be just the same whether the Kootenay County Court Judgeship be vacant or not. It seems impossible that the legislature could have intended that Mr. Spinks should have power to go and sit in Kootenay, and try criminals there in the presence of an actually appointed Kootenay County Court Judge. It could not be intended that Mr. Spinks should have power to come and hold such a court in Victoria next week, which is, nevertheless, the necessary result of the construction contended for by the Crown; or that the Nanaimo County Court Judge should have power to go and preside in a Speedy Trials Court at Kamloops while Mr. Spinks was at the other end of the town. But if these courts may be held in any part of the Province before any County Court Judge the trial or sentence by him would be lawful. (No such objection lies to jurisdiction of a Supreme Court Judge for the reason already pointed out.) Moreover, this construction affords nothing to guide the sheriff as to the judge to be notified under sect. 6 of the Act, if he may notify "any Judge" of "any County Court;" enabling, in fact, the sheriff in each county to confer jurisdiction on whom he may select as the trial judge. The argument for the Crown seemed to regard too much the actual vacancy of the Kootenay County Court judgeship, which is accidental merely, and not sufficiently to consider that a construction must be adopted, which would apply not only in Kootenay but in [63] every County Court District in British Columbia whether the judgeship be vacant or not. Which is the judge whom the sheriff

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(1) 5 App. Cas. 115; *ante*, vol. 1, p. 158.

is to notify under sect. 6? The counsel for the Crown say not one word is to be added to the Act. But in that case the sheriff may notify any County Court Judge; nor is it easy to see why, according to this, the jurisdiction should necessarily be confined to County Court Judges of British Columbia. There are County Court Judges in Manitoba; and if the Speedy Trials Court in British Columbia may be held before any person who is a County Court Judge, one of these might, according to the contention of the Crown, be invited to preside. It seems extremely inconvenient that it should be possible for every County Court Judge to be liable to wander all over the Province on the invitations of various sheriffs to ask prisoners how they will be tried, by himself or by jury. And so even the argument for the Crown requires the addition of the words "in B. C.," and I think the clear intention is further to add the words "within his county."

The case of *Hudson v. Tooth* (1) very strongly shews the necessity for a strict compliance with the territorial limitations (if any) in the judge's commission. There, as here, full jurisdiction over persons and subject matters had been given by a statute to the judge, who was, however, not appointed by the statute, but was to be appointed by the Archbishop of Canterbury. The Archbishop appointed Lord Penzance by an instrument called a "requisition," strictly analogous to the Government's commission to Mr. Spinks in the present case. This instrument only empowered Lord Penzance to hear and determine the matter in question at any place in London or Westminster, or in the diocese of Rochester. There were no negative words precluding him from sitting elsewhere; in this respect also identical with this commission. The hearing actually took place in the library of Lambeth—almost within hearing distance of the Palace of Westminster, just across the Thames, where the judge would have had undoubted jurisdiction, but Lambeth was neither in London, or in Westminster, or in Rochester diocese. The defendant had full notice of the sitting, but did not appear. No objection was taken at the time; but after judgment the whole of the proceedings were set aside on the defendant's application in prohibition, Chief Justice Cockburn, and Mellor and Lush, JJ., all expressing extreme regret, but holding that there had been, not an excess or defect of jurisdiction, but a total absence of jurisdiction to sit and hear elsewhere than according to the tenor of the instrument appointing the judge.

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[64] Whatever be the decision upon that point, should it ever come to be decided, it is as well to point out that in any event the construction contended for by the Crown is not necessary to prevent any defect or delay of justice. Whatever doubt there may be as to Mr. Spinks' jurisdiction, application can always be made to one or other of the five Judges of the Supreme Court, whose powers are incontestable; and some one of these can in general hold a Court in Kootenay as conveniently as the Judge of the County Court of Yale. The legislature, indeed, seems to be aware that in British Columbia a great deal of the County Court work is done by the Judges of the Supreme Court, by giving them jurisdiction to sit in these new courts; which is not the case in the five older and more completely organized Provinces. If I had merely a doubt on the question I might be moved by the principle of in favorem libertatis; but I think upon the above grounds that the learned Judge of the County Court of Yale had no authority to sit and try the prisoner at Donald, and that the prisoner should be discharged from his present sentence. The trial was in every particular coram non iudice. The prisoner has never been tried at all.

I give no opinion upon the point whether Mr. Spinks might not have tried the prisoner lawfully enough if sitting within his own territorial jurisdiction, for no such point arises here. There are tolerably reasonable grounds to hold that he might. An alleged criminal has a prima facie right, it is true, to be tried in the bailiwick where the offence was committed; but that is merely on account of the jury. If a prisoner elects to waive a jury there seems to be no particular reason for adopting that or any particular venue. If the prisoner elect to be tried by a jury he would, of course, be remanded by the judge to be tried in the proper bailiwick.

CREASE, J.:—

The object of the present writ of error is to try whether his Honour Judge Spinks, the Judge of the County Court of Yale, had jurisdiction to try a felony at Donald, under the Speedy Trials Act, in the County of Kootenay, without a commission from the Governor-General, as County Court Judge also for the County of Kootenay.

The facts are these: Mr. William Ward Spinks holds a commission from the Governor-General, as Judge of the County Court of Yale, the limits of which, as expressed in the commission (in accordance with sect. 5 of the County Courts Act in the Consolidated Statutes of British Columbia, cap. 25, page 172), are "The Polling [65] Divisions of Cache Creek, Kamloops, Nicola Lake, Okanagan,

and Rock Creek, of the Electoral District of Yale." By the same local Act the County Court of Kootenay is established, having jurisdiction "throughout the Electoral District of Kootenay."

The questions which arise in this case are two fold :

(1.) Whether under the Speedy Trials Act Mr. Spinks, a County Court Judge for Yale, has jurisdiction to try and sentence a prisoner for felony in the County of Kootenay, without having a commission from the Governor-General as County Court Judge for Kootenay ;

(2.) Whether under the B. C. Act, the 53 Vict. c. 8, sect. 9 (1890), he had the necessary jurisdiction for the purpose.

That Act enacts :—"That until a County Court Judge is appointed for Kootenay, the County Court Judge for Yale shall act as and perform the duties of County Court Judge for Kootenay, and shall, while so acting, have in respect of all matters and proceedings being carried on in the County of Kootenay, all the powers and authorities that the judge of the County Court of Kootenay, if appointed and acting in the said district, would have possessed in respect of such actions, suits, and proceedings." And for the purposes of this Act (it goes on to say), but not further or otherwise," the two several County Court districts before specified "shall be united."

The same point which is now raised first came up in the case of one Brady at the Spring Assize at Kamloops, but under circumstances which did not call for the consideration of this court.

By the writ of error, however, of Piel Ke-ark-an, and the state of facts set forth in the pleadings now before us, the question of Mr. Spinks' jurisdiction to try a case under the Speedy Trials Act in the County of Kootenay, while County Judge for Yale, has come up in such shape as calls for adjudication.

By Dominion Statute, 51 Vict., cap. 46 (1888), the Speedy Trials Act, having been found to work well in Ontario, Quebec and Manitoba, was extended into British Columbia ; and in the interpretation clause the expression "Judge" was declared to mean and include the Chief Justice or any Puisne Judge of the Supreme Court, or "a Judge of a County Court" in British Columbia.

In 1890, by Dominion Statute, 52 Vict. c. 47, the Speedy Trials Act underwent amendment. By it, in Nova Scotia, New Brunswick and Prince Edward Island the "Judge" was declared to mean and include "any Judge of a County Court" in the said respective Provinces, and no higher judge was named ; while in British Colum-

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Court " in British Columbia, words that are made interchangeable with "any Judge of any County Court" in the Province.

And it is not for a moment denied that Mr. Spinks is in every respect a Judge of a County Court in British Columbia, and falls well within the wording of the above section.

It must not be forgotten that the Dominion Parliament had full power to pass such an Act, for by sect. 101 of the British North America Act, 1867, the Dominion Government has power to appoint any additional court in British Columbia for the administration of the laws of Canada, under which category the Speedy Trials Act comes.

It is a Dominion law in a Dominion matter.

And while by sect. 92, sub-sect. 14, of the British North America Act, the administration of justice and the constitution of Courts were exclusively given to the Provincial Legislature, an exception was distinctly made of the powers retained in federal hands by sect. 101. I say retained, because this provision has all the force of an exception out of a grant—a something never granted or parted with—as contrasted with a reservation—a something taken back out of what has been already given—a distinction not without significance.

The Dominion Legislature, at the time of this amendment, must be considered to have been fully aware of all the circumstances upon which they were legislating.

They must be taken to have known what counties there are in the Province like Kootenay, necessarily without a Judge, and that if the Dominion Government made a new County Court Judge for Kootenay they would be bound to insert the statutory obligation for a fixed residence within Kootenay, while the Yale Judge was still similarly bound to a fixed residence in Yale. They must, presumably, also have considered that such an expensive appointment was not yet called for by the circumstances of the country; and that they must make some general arrangement which would enable them to confer upon the scattered populations of all those outlying counties throughout Canada—Kootenay among them—the same benefits of the Speedy Trials Acts as they had bestowed on New Brunswick, Manitoba, Nova Scotia, and other parts of Canada. The main evil of non-residence of a County Court Judge in such a [67] county as Kootenay was the chief mischief they had to remedy. The impracticability of a Judge residing in two counties at once (Yale and Kootenay) was necessarily in their minds. They had already found the Act succeed in several other Provinces with scattered counties and scattered populations; and it was by no means surprising that they should apply the same means of giving

prisoners a ready chance of avoiding a long imprisonment before trial, in the intervals between Assizes, by the option of a speedy trial before a County Court Judge. Being, therefore, prepared to cure an admitted evil in British Columbia, the statute in question has to be construed as a remedial Act.

Of such statutes, Endlich, in his Interpretation of Statutes, Ed. 1888, says: "they are to be construed liberally to carry out the purpose of the enactment, suppress the mischief, and advance the remedy contemplated by the Legislature; and this is all that liberal construction consists in—they are to be construed, giving the words 'the largest, fullest, and most extensive meaning of which they are susceptible.'" It may be said, being in a criminal matter, the words of the Act should be construed strictly; but the same authority, commenting on Maxwell on Statutes, observes: "It is true that a penal law must be construed strictly and according to its letter, but this strictness which has run into an aphorism, means no more than that it is to be interpreted according to its language.

. . . . Acts of this kind are not to be regarded as including anything which is not within the letter as well as their spirit." But this Act, although it deals with criminal matters, is a remedial rather than a penal statute, for its ratio existendi is to save perhaps an innocent person from, possibly, long imprisonment in the upper country before he can be tried at the then next Assize. Except as a beneficial and remedial Act it was in nowise necessary, because the criminal law of Canada already provides for the trial of every conceivable crime by the machinery of the Courts of Oyer and Terminer at Assizes at regular statutory, though somewhat distant, intervals.

The Speedy Trials Act, as its name imports, is to provide an earlier, almost an immediate, hearing for a prisoner should he so desire. His adoption of its provisions instead of waiting to be tried before a jury is entirely voluntary and optional on his part. The Act, therefore, is in the best acceptance of the word remedial. The Court is there; the County Court Judges' Criminal Court of Kootenay, seal, sheriff, deputy registrar and officers are all there—indeed everything is there ready for trials under this Act except [68] the judge—and when we look for that we find the kind of County Judge contemplated by the legislature defined in words, which it is impossible to misconstrue, in the statute which, in sect. 2, enacts that the Act may be carried out by "*any Judge of a County Court*" in the Province of British Columbia.

Mr. Spinks is undisputed County Judge for Yale, and therefore it appears to me (though some of my learned brethren think

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differently) is, and at the trial of Piel Ke-ark-an was, the judge within the meaning of the Act, fully qualified as far as jurisdiction goes to hold court in any part of British Columbia, including Kootenay, and therefore to try Piel Ke-ark-an in that county.

Mr. Spinks' notice was drawn to the fact of the arrest and the crime charged in the usual manner by the sheriff of Kootenay under sect. 6, as the nearest County Judge at hand to try the case.

The sheriff's notice did not pretend to confer jurisdiction. That was already given by statute. If the sheriff gives notice to one judge having jurisdiction the case might be, and often has been for convenience sake, tried by another Judge having jurisdiction, and no question has ever arisen as to the legality of a trial under such circumstances. Nor has anyone complained that the Supreme Court Judges trying speedy trial cases, and not furnished with a special commission covering the ground from the Governor-General, were acting *ultra vires*. The Governor-General's formal assent to the Act was sufficient without special commission (*Valin v. Langlois*) (1), and so also in Quebec, Manitoba, New Brunswick and Nova Scotia.

The sheriff's notice was a ministerial act by a ministerial officer—a notification of a fact in the same way as he might have communicated the fact to any one of the five Supreme Court Judges, the same as he might have done to any other of the four County Court Judges readily available. The County Court Act provides for county work being done in a county where, under certain circumstances, a County Judge is absent by another County Judge, and the usual practice has been in County Court matters for neighbouring judges to reciprocate similar good offices, and to be auxiliary to each other; and where no express charge is given by the statute to the contrary the usual course (provided it does not run counter to the spirit of the Act) may be adopted and will be sustained by the law, *Eis quæ frequentius acciderint jura subser-vient*, and this was the course adopted here.

[69] The notice was duly given to the nearest County Judge, the prisoner arraigned, the legal questions put to him, and the choice of trials given, as allowed to him by the Act; all proper forms and conditions for trial and sentence were observed, and, on proof of guilt, a term of imprisonment was imposed in lawful proportion to the offence.

This conclusive result having been obtained under the Dominion Statute makes it unnecessary for me to enter into the second branch

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(1) 3 Can. S. C. R. 1; *ante*, vol. 1, p. 167.

of the subject, namely, whether and how far provincial legislation (particularly see sect. 9 of the 53 Vict. [B. C.], c. 8, already quoted) supports Mr. Spinks' authority, or enlarges his jurisdiction over Kootenay for the purposes of the Speedy Trials Act. And as I rely on that Act as being quite sufficient of itself for all the purposes of the Act, it becomes equally unnecessary to invoke the precedent in *Re Parker* cited by the Attorney-General from the December Law Times, or the strong judgment in the case of *Crowe v. McCurdy*. (1)

In my opinion no error has been shewn, and as the Dominion Act appears to me to be clear and conclusive on the point at issue, and to have been duly followed, I consider and adjudge that the conviction of Piel Ke-ark-an should be sustained and the sentence carried out.

MCCREIGHT, J.:—

If it was not for the opinions of some of my learned brothers, I would have thought the words of the Act were plain to shew that any Judge of a County Court can sit in any part of the Province to try prisoners under the Speedy Trials Act, 1889, cap. 47 (Dominion).

The expression "In the Province of British Columbia the Chief Justice or a Puisne Judge of the Supreme Court, or any Judge of a County Court," seems to me to admit of no other construction. It is to be observed that in the first Act dealing with the subject (Rev. Stat. Can. 2097), the exception was, as to Manitoba, "a Judge of a County Court," and I think the word "any" in the expression "any Judge of a County Court" has been advisedly substituted for "a Judge of a County Court," as regards Nova Scotia, New Brunswick, Prince Edward Island, Manitoba and British Columbia (Act of 1889, c. 47); no doubt because of the inconvenience occasioned by the former Act, practically throwing the trials on a Supreme Court Judge whenever there was no County Court Judge available, as being within the jurisdiction, and his court generally having jurisdiction at the place of the trial of the prisoner.

[70] The inconvenience of a contrary and restricted construction would be seriously felt in Manitoba as well as in British Columbia, and still more so in Nova Scotia, New Brunswick and Prince Edward Island, where the Act would be frequently rendered useless.

The word "any" is a favourite expression of draughtsmen of bills. Of course when I refer to "inconvenience" it is merely with

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reference to the fact that the Dominion Legislature is not to be understood as intending the Act to have an "inconvenient" operation, but plain rules for construing statutes seem to me to require the full meaning to be given to the word "any" unless some absurdity will be involved in that construction. The word "any" is repeatedly used in the Act; always, I think, advisedly, and with its ordinary and grammatical meaning. We cannot strike out the words "any Judge of a County Court" and substitute the words "the County Court Judge having jurisdiction in the county where the prisoner is to be tried."

The argument that this interpretation of the Act would amount to usurpation by the Dominion Legislature of the functions of the Governor-General seems to prove too much.

Both Supreme and County Court Judges hold courts under the Speedy Trials Act by virtue of legislation, and certainly not in consequence of their commissions—and see the remarks of Ritchie, C. J., in *Valin v. Langlois* (1) to the effect that the Governor-General in assenting to an Act of the Dominion puts matters substantially in the same position as if he had issued commissions.

I think, moreover, that after the remarks of Weatherbe and Thompson, JJ., in *Crowe v. McCurdy* (2), the prisoner's trial would, perhaps, be justified by provincial legislation enlarging the area of jurisdiction if that is the meaning of 53 Vict., c. 8, B. C. But I prefer to rest my decision simply on the Speedy Trials Act, 1889, as there appears to be doubt on the other point. I think no error is shewn in the record, and there should be judgment accordingly.

WALKER, J. :—

The prisoner was convicted of a felony in the County of Kootenay by Mr. Spinks, the Judge of the County Court of Yale, and has applied to have the conviction quashed on the grounds that the judge had no jurisdiction in Kootenay, as his commission limited his authority to the County of Yale. For the Crown it has been contended that the jurisdiction existed by virtue of sect. 9 of the [71] County Courts Amendment Act, 1890, and, independently of that section, or cumulatively, by the Speedy Trials Act

Sect. 9 is as follows :—"Until a County Court Judge of Kootenay is appointed, the Judge of the County Court of Yale shall act as,

(1) 3 Can. S. C. R. 1; *ante*, vol. 1, p. 167. (2) 6 Russell & Geldert, 301.

and perform the duties of, the County Court Judge of Kootenay, and shall, while so acting, whether sitting in the County Court District of Kootenay or not, have in respect of all actions, suits, matters, or proceedings being carried on in the County of Kootenay, all the powers and authorities that the Judge of the County Court of Kootenay, if appointed and acting in the said district, would have possessed in respect of such actions, suits, matters and proceedings; and for the purposes of this Act, but not further or otherwise, the several districts, as defined by sects. 5 and 7 of the 'County Courts Act,' over which the 'County Court of Yale' and the 'County Court of Kootenay' respectively have jurisdiction shall be united."

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The districts which are thus united constitute the statutory counties of Yale and of Kootenay. In each of those counties a separate County Court has been created by the County Courts Act—with its separate seal, expressive of its title, "The Seal of the County Court of Yale," "The Seal of the County Court of Kootenay." As we have, as Judges of the Supreme Court, concurrent jurisdiction by statute with the Judges of the County Courts in their respective courts, we may take judicial notice, also of the fact, that up to the present each of the two courts has had its registrar and staff of officers, and each of the two counties its sheriff. Although by the section the counties are united, their respective courts are not. There is no extinction of either, no merger, no one court, for example, for the united counties. They are left as independent of each other as when first established. In this condition of things, the section proceeds in substance to enact that until a County Court Judge of Kootenay be appointed by the Governor-General, the Judge of Yale shall fill his place. What is this but the appointment of a judge to a vacant judgeship? The arrangement, it is true, is provisional; but it is not the less an appointment on that score. Cases were cited to shew that a Provincial Legislature may extend the jurisdiction of a County Court in respect of area as well as subject matter; but the present is not legislation of that character. It does not enlarge the area of the Yale Court; but what it assumes to do is to appoint the judge of that court—and he is not the court—to be Judge of the Kootenay Court. The mere [72] device of uniting the two counties cannot give the legislature such a prerogative right, and correspondingly dispossess the Governor-General of it. By sect. 96 of the British North America Act, "The Governor-General shall appoint the Judges of the Superior, District, and County Courts in each Province, except those of the



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Courts of Probate in Nova Scotia and New Brunswick." As sect. 9 trenches upon this provision it is unconstitutional; hence Judge Spinks has acquired no jurisdiction under it in Kootenay.

The next question is—Does the Speedy Trials Act confer that jurisdiction?

By sect. 2 it is enacted that "unless the context otherwise requires,—

"(a) The expression 'Judge' means and includes,—

"(1) In the Province of Ontario, any judge of a county court, junior judge or deputy judge authorized to act as chairman of the General Sessions of the Peace, and also the judge of the provisional districts of Algoma and Thunder Bay, and the judge of the district court of Muskoka and Parry Sound, authorized respectively to act as chairman of the General Sessions of the Peace.

"(2) In the Province of Quebec, in any district wherein there is a judge of the sessions, such judge of sessions, and in any district wherein there is no judge of sessions, but wherein there is a district magistrate, such district magistrate, and in any district wherein there is neither a judge of sessions nor a district magistrate, the sheriff of such district;

"(3) In each of the Provinces of Nova Scotia, New Brunswick and Prince Edward Island, any judge of a county court;

"(4) In the Province of Manitoba, the chief justice, or a puisne judge of the Court of Queen's Bench, or any judge of a county court;

"(5) In the Province of British Columbia, the chief justice or a puisne judge of the Supreme Court, or any judge of a county court;

"(b) The expression 'county attorney' or 'clerk of the peace' includes in the Provinces of Nova Scotia, New Brunswick and Prince Edward Island, any clerk of a county court," etc.

Sect. 4 makes the court a court of record, which is to be called (except in Quebec, which is divided into districts and not counties) "The County Court Judge's Criminal Court of the County" (or union of counties, as the case may be) in which the trial takes place.

[73] Sect. 5 specifies the offences which may be the subject of trial, provided the person charged with any of them consents.

Sect. 6 requires the "sheriff of the county" to "notify the Judge" of any commitment to prison for trial, within twenty-four hours thereafter.

Sect. 7 authorizes the trial to be had without jury. The remaining sections relate to procedure, and the duties of county attorneys, clerks, and other county officers.

The question of jurisdiction turns upon the construction to be given to the words "any Judge of a County Court," as they appear in sub-sect. 5 which relates to this Province. On behalf of the Crown it was contended that they should be construed literally; but if that were so they would mean any Judge of a County Court in any part of the Dominion or elsewhere. The provision in the same sub-section (see *b*) that, "the expression 'County Attorney' or 'Clerk of the Peace' includes in the Provinces of Nova Scotia, New Brunswick and Prince Edward Island, any Clerk of a County Court," would, according to the same construction, include the County Court Clerk of any place. A literal construction is therefore manifestly to be avoided. It was also said that "any Judge of a County Court" cannot mean such judge "when acting within his county," as the latter words are not in the Act and must not be interpolated. But a proper construction of the words does not require such an interpolation; for, even if that were in the Act, they would be superfluous, as the judge's jurisdiction within his county is *prima facie* complete without them. On the other hand, to justify the contention of the prosecution, some such interpolation as the following is needed: "And such Judge of a County Court may sit as a Judge under this Act in any part of the Province." The rules of construction with respect to statutes and the provisions of the Act are alike opposed to this mode of interpretation. The Act does not establish one Dominion Criminal Court in each Province, with a staff of judges and clerks having concurrent jurisdiction in their respective positions over the whole Province; but it has established a Court in each county and district of the several Provinces, to be called (except in Quebec) "'The County Court Judge's Criminal Court' of the county, or union of counties," where the trial takes place. In framing the Act the legislature, evidently, availed itself of the condition of things existing in each Province with respect to the administration of justice. It employed, so to speak, existing [74] provincial machinery to give effect to its new system of criminal procedure; and it is observable that it made no alteration in that machinery. For instance, it adopted the then divisions of each Province into districts, counties, and united counties, and established the new court in each; it nominated the existing judges of the Superior Courts (except in the older Provinces), and of the District and County Courts of all the Provinces, to be the judges respectively of the new courts; and in like manner it made use of existing appointees of each Province, such as county attorneys, county sheriffs, Clerks of the Peace, and County Court Clerks, for the performance of duties in the new court corresponding with those

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of their respective offices. There is not a word in the Act which increases any of the territorial divisions, or extends the jurisdictional area of any of the judges, sheriffs or clerks, each of whom is, manifestly to act within the provincial limits assigned to him, and not beyond. It would be of evil consequence were it otherwise. Sect. 6 for instance, which requires the sheriff of the county to "notify the Judge" of the imprisonment of any person committed to trial, would, if the contention of the prosecution were allowed, enable the sheriff, at his option, to notify any county judge of the Province, and in that way give him power to select the prisoner's tribunal. The Act would thus introduce and legalize at the outset of a trial a new and vicious principle in the administration of justice. "Any county court clerk" would also, for the same reason consider himself entitled to intermeddle in the criminal business of any other county than his own. This, if permitted, would go far to defeat the object and general design of the Act. There is no magic in the words "any judge." In a legal sense, he is no more a judge beyond his appointed province, district or county, than a magistrate is a magistrate beyond his district, or a sheriff is such beyond his bailiwick. Moreover, to hold the contrary would be to hold that the words "any judge" have conferred upon the county court judges an enlarged, and therefore new, jurisdiction in respect of area, and have consequently made Judge Spinks—what he was not and is not—a judge beyond his appointed county. As the present Act purports to confer a new jurisdiction, it must be strictly construed. That jurisdiction cannot be implied, but must be given in explicit language: Maxwell on Statutes, 158, 357-363. There is an explicit gift as to subject matter, but nothing approaching one in respect of area. Judge Spinks, therefore, has not the jurisdiction which he exercised within the precincts of Kootenay, hence his conviction of the prisoner must be quashed.

DRAKE, J.:—

[75] There are two points urged by the Attorney-General as grounds why this prisoner Piel Ke-ark-an should not be discharged on this writ of error:—

1st.—That under the Speedy Trials Act the words used in defining a judge who may exercise jurisdiction in British Columbia under the Act, are "any Judge of a County Court." That W. W. Spinks is a Judge of a County Court duly appointed, and that although the trial took place out of the limits of Yale County Court, yet under the words of the statute he or any County Court Judge had jurisdiction over the prisoner.

2nd.—That under sect. 9 of the County Courts Amendment Act, 1890, the Local Legislature empowered the Judge of the County court of Yale to act and perform the duties of the County Court Judge of Kootenay, and that the Provincial Legislature under sub-sect. 14 of sect. 92 of the British North America Act, had full power to pass that section.

With regard to the first contention, the literal meaning of the words used will confer jurisdiction on any and all county court judges of the Province of British Columbia who may hold appointments by commission from the Governor-General, unless it can be shewn from the context, or from subsequent parts of the Act, that such a construction is not intended, or would lead to confusion.

If we turn to sect. 6 we there find that every sheriff shall notify the judge in writing of the confinement of the prisoner and the charge preferred, whereupon such judge shall cause the prisoner to be brought before him.

What judge is here meant, if it is any County Court Judge of the Province, it enables the sheriff to select the judge, because the judge so notified is to try the prisoner.

The meaning of this section, in my opinion, is that the sheriff of the district is to notify either a Supreme Court Judge, whose jurisdiction is coextensive with the Province, or any County Court Judge having jurisdiction within the district where the prisoner is committed for trial.

The term "the Judge" implies that there is a Judge of, or authorized to act in, that particular district; if it were otherwise the words used would have been "a Judge."

[76] The Legislature of the Dominion has power to impose on the judge additional duties, but these additional duties must be performed within the limits of the judicial districts to which the judges are appointed; any other contention would interfere with the power of appointment of the judges vested in the Governor-General by sect. 96 of the British North America Act. I therefore think that the words "any Judge of a County Court" must be read as meaning any Judge of a County Court having jurisdiction where the offence was committed, and therefore, as W. W. Spinks holds a commission of the County Court of Yale only, and the place where Piel Ke-ark-an's offence was committed was within the limits of a separate County Court district, that the conviction was made without jurisdiction.

The next question that arises is, whether or not the Provincial Legislature in empowering the county court judge of Yale to per-

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form the duties of the county court judge of Kootenay were legislating within their power ?

The power to establish courts of civil and criminal jurisdiction is vested in the Provincial Legislatures, except in so far as the Parliament of Canada may establish Courts under sect. 101 of the British North America Act. I think the County Court Judges' Criminal Court is a court established under the latter section.

The limits of Yale District County Court were defined by the Act, cap. 25 of the Consolidated Statutes, 1888, and are so set out in the commission which W. W. Spinks holds ; and by the same Act a County Court was established in the electoral district of Kootenay, but no County Court Judge has yet been appointed to that district. By cap. 8 of Act of 1890 it is provided that the County Court Judge of Yale is to perform the duties of the County Court Judge of Kootenay—in other words, the Provincial Legislature appoint a judge to the vacant district.

I have no doubt but that the Provincial Legislature has full power to make alterations in the areas of the various County Court Districts, which the varying necessities of the country require, and can direct courts to be held in various places, and such alterations will not require a fresh commission to the judges (see *Crowe v. McCurdy* (1), but the effect of sect. 9 of the County Courts Amendment Act, 1890, is a very different exercise of power, and so far as it purports to appoint the County Court Judge of Yale to perform the duties of the County Court Judge of Kootenay it is ultra vires and void.

[77] I therefore think that the prisoner Piel Ke-ark-an is entitled to have the judgment against him reversed, and that he be discharged from custody.

THE ATTORNEY-GENERAL FOR CANADA,

(Plaintiff) Appellant ;

AND

THE ATTORNEY-GENERAL OF THE PROVINCE OF ONTARIO,

(Defendant) Respondent.

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March 13.*On appeal from the Court of Appeal for Ontario.**[Reported 23 Can. S. C. R. 458.]**Pardoning Power of Lieutenant-Governors—B. N. A. Act, ss. 65, 92—51 Vict., c. 5 (O.).*

The Ontario Legislature, by an Act respecting the Executive Administration of Laws of the Province, provided that in matters within the jurisdiction of the Legislature all powers, authorities and functions which, in respect of like matters, were vested in or exercisable by the Governors or Lieutenant-Governors of the several Provinces now forming part of the Dominion of Canada, or any of the said Provinces under Commissions, instructions or otherwise should “so far as this Legislature has power thus to enact” be vested in and exercisable by the Lieutenant-Governor or Administrator for the time being of the Province :—

*Held*, that this enactment was not beyond the competence of the Provincial Legislature.

APPEAL from a judgment of the Court of Appeal for Ontario (1) confirming the order and judgment of the [459] Chancery Division of the High Court of Justice for Ontario (2) declaring that it was within the power of the Legislature of Ontario to pass the Act 51 Victoria, chapter 5, intituled “An Act respecting the Executive Administration of Laws of this Province,” and each and every section thereof.

This action was brought under sect. 52 (2) of the Judicature Act (R. S. O. c. 44) for a declaration touching

(1) 19 App. Rep. 31 ; *post*, p. 537. (2) 20 Ont. Rep. 222 ; *post*, p. 545.

\**Present* :—SIR HENRY STRONG, C.J., and FOURNIER, TASCHEREAU, GWYNNE, and KING, JJ.



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the validity of the statute of Ontario passed in 1888 (51 Vict., c. 5) entitled "An Act respecting the Executive Administration of Laws of this Province." The following is the statement of claim filed in the case:—

"1. The Attorney-General for the Dominion of Canada alleges that the Act of the Legislative Assembly of the Province of Ontario, 51 Victoria, chapter 5, entitled 'An Act respecting the Executive Administration of Laws of this Province' is invalid, and of no force or effect, inasmuch as it was beyond the power of the said Legislature to pass such statute.

"2. The said Attorney-General states that the said statute purports to confer upon the Lieutenant-Governor or the administrator for the time being of the said Province, powers, authorities and functions beyond those conferred upon the said Lieutenant-Governor or administrator by the British North America Act, and beyond those which it is within the power of the said Legislative Assembly to confer.

"3. It purports also to include in such powers so conferred the right of commuting and remitting sentences for offences against the laws of the Province, or offences over which the legislative authority of the Province extends, and is in this respect beyond the power and authority of the said Legislative Assembly to enact.

[460] "4. The said statute is in contravention of the limitation imposed upon the said Legislature by the exception contained in section 92 of the British North America Act, as regards the office of Lieutenant-Governor.

"5. The said statute purposes either to declare the meaning of or to amend the British North America Act in the matters thereby dealt with, and is in either case beyond the competence of the said Legislature."

The Attorney-General of Ontario demurred, on the ground that the Act was *intra vires*.

*Robinson, Q.C.*, and *Lefroy* for the appellant :

The statute having been passed became the subject of certain correspondence between the two Governments, and this correspondence was before the Court of Chancery on the argument, as well as certain other documents which are printed, and these documents we have agreed should be put before this court.

This being a case of public character a very full abstract of the argument before the Chancery Division is given in 20 Ont. Rep., 222. Before the Court of Appeal the case was again argued at length, and the argument on the other side having been taken down in shorthand, my learned friend, Mr. Blake, has had it printed in the form of a pamphlet. We have ours printed, also, and we would suggest, with the consent of my learned friend, that, without repeating these arguments in detail, we hand into court these printed pamphlets, repeating here only the main propositions on both sides, which will have the effect of curtailing very much our present argument. The case is, moreover, of such a character that we cannot add anything very new, with this exception, that we find it necessary to say a few words on the late decision by the Privy Council, in 1892, since the argument in the Court of Appeal, of *Liquidators of the [461] Maritime Bank v. Receiver-General of New Brunswick* (1) which my learned friend conceives has advanced his argument very far, and renders a great part of it unnecessary by confirming the position of the Province.

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(1) [1892] A. C. 437 ; *ante*, p. 1.



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The learned counsel then contended that all prerogative powers and functions not specifically bestowed by the British North America Act upon the Governor-General or the Lieutenant-Governors, remain, as is expressly stated by sect. 9 of that Act, vested in the Queen, and can only be delegated by her through the usual channel of commissions and instructions. He also quoted as part of his argument the view adopted by the Minister of Justice in recommending the disallowance of the Quebec Act, 49 & 50 Vict., c. 98, respecting the executive power, in which he states: "The office of Lieutenant-Governor is one of the incidents of the constitution, and the authority to legislate in respect thereof is excepted from the powers conferred upon the Legislatures of the Provinces, and is exclusively vested in the Parliament of Canada. In the opinion of the undersigned, it is immaterial whether a Legislature by an Act seeks to add or take from the rights, powers or authorities which, by virtue of his office, a Lieutenant-Governor exercises. In either case it is legislation respecting his office." (1)

The learned counsel further contended that the Act of the Ontario Legislature, now in question, was clearly ultra vires, because it assumed to legislate upon all prerogative powers, no matter of how high and sovereign a character, so far as such powers had their operation in or had respect to the matters placed within the legislative jurisdiction of the Provinces by sect. 92 of the British North America Act. He pointed out that the [462] powers contained in commissions and instructions to Governors and Lieutenant-Governors were almost exclusively of a high, sovereign and fundamental char-

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(1) Hodgins' Reports of Ministers of Justice, Vol. 2, p. 58, see also pp. 201-202.

acter, and not what have been called minor prerogatives. The learned counsel contended that the fact that such prerogatives might in their exercise and operation touch the subjects placed within the exclusive legislative jurisdiction of the Provincial Legislatures, did not bring the prerogative powers themselves within that jurisdiction, and that under what has been called the general law of the Empire, colonial legislatures have no right to legislate with regard to them, and that, therefore, the Ontario Legislature had no power whatever "thus to enact." In support of these contentions the learned counsel relied on the points of argument advanced in the Court of Appeal for Ontario.

Reference was also made to the instructions now received by the Governors-General, and it was contended that the power of pardon there given must be exclusive and cannot co-exist in the Lieutenant-Governors of the Provinces unless by delegation from the Governor-General under the powers in that respect conferred upon him

The learned counsel then referred to the case of the *Liquidators of the Maritime Bank v. Receiver-General of New Brunswick* (1), and contended that that case left the question involved in the present case unaffected, citing the passage in which the Judicial Committee state that the provisions of the British North America Act "nowhere profess to curtail in any respect the rights and privileges of the Crown or to disturb the relations then existing between the Sovereign and the Provinces." He contended that though that case, no doubt, decides that in matters of provincial government the Lieutenant-[463] Governor is as much the direct representative of

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Her Majesty as the Governor-General is in matters of Dominion government, yet the fact remains that both Governors-General and Lieutenant-Governors only represent the Queen in a modified manner. The degree to which in either case they represent her depends upon the provisions of the British North America Act on the one hand, and the powers delegated by commissions and instructions on the other hand. (1)

*E. Blake, Q. C. (Æmilius Irving, Q. C., with him)* for the respondent.—I may conveniently open my argument by referring to that authority to which my learned friends have referred, and which they think does not add much to the position of the Province. I would ask your Lordships to consider what the case of the *Liquidators of the Maritime Bank v. Receiver-General of New Brunswick* (2) does establish, not in the way of stating any new views, but as placing in a proper light the position of the Province with reference to legislative powers. It appears to me that in that case their Lordships of the Judicial Committee had concluded to make a definite statement of their view of the position of the Province and to place their decision upon a broad and clear view of the result of the previous decisions affecting the rights of the different Provinces of the Dominion. There is nothing said in that case at all inconsistent with the decision of this court from which it was an appeal. On the contrary, the decision was affirmative of the view of this court as to the prerogative of the Lieutenant-Governor.

The judgment in the case referred to at page 441 of the report [1892] A. C., begins by pointing out that "the

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(1) See also report of argument in 20 Ont. Rep., pp. 224, *et seq.*

(2) [1892] A. C. 437 ; *ante*, p. 1.

appellants did not impeach the authority of these cases [464] (*Reg. v. Bank of Nova Scotia* (1), and *Exchange Bank of Canada v. The Queen* (2)), and they also conceded that until the passing of the British North America Act, 1867, there was precisely the same relation between the Crown and the Province which now subsists between the Crown and the Dominion. But they maintained that the effect of the statute has been to sever all connection between the Crown and the Provinces; to make the government of the Dominion the only government of Her Majesty in North America; and to reduce the Provinces to the rank of independent municipal institutions." In respect to this contention their Lordships used this language: "For these propositions, which contain the sum and substance of the arguments addressed to them in support of this appeal, their Lordships have been unable to find either principle or authority." Then there is the authoritative statement that the British North America Act does not "disturb the relations then subsisting between the Sovereign and the Provinces. The object of the Act was neither to weld the Provinces into one, nor to subordinate provincial governments to a central authority, but to create a federal government in which they should all be represented, entrusted with the exclusive administration of affairs in which they had a common interest, each Province retaining its independence and autonomy. That object was accomplished by distributing, between the Dominion and the Provinces, all powers executive and legislative, and all public property and revenues which had previously belonged to the Provinces; so that the Dominion Government should be vested with such of these powers, property, and rev-

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(1) 11 Can. S. C. R. 1; *ante*, vol. 4, p. 391. (2) 11 App. Cas. 157.



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enues, as were necessary for the due performance of its constitutional functions, and that the remainder should be retained by the Provinces for the purposes of provincial government. But in so far as regards those matters, [465] which, by sect. 92, are specially reserved for provincial legislation, the legislation of each Province continues to be free from the control of the Dominion, and as supreme as it was before the passing of the Act." This language is important because there will be found in a subsequent part of the judgment an indication of what will necessarily follow from the idea that the Queen was present as a part of the provincial legislature in legislative acts, and it follows, in the opinion of their Lordships, as a necessary proposition that she was present. Their Lordships say, at page 443 of the report: "It would require very express language, such as is not to be found in the Act of 1867, to warrant the inference that the Imperial Legislature meant to vest in the Provinces of Canada the right of exercising supreme legislative powers in which the British Sovereign was to have no share." And again, in speaking of the objection that the Lieutenant-Governor of the Province is not appointed directly by Her Majesty, but by the Governor-General, who has also the power of dismissal, their Lordships say: "The act of the Governor-General and his Council in making the appointment is, within the meaning of the statute, the act of the Crown; and a Lieutenant-Governor, when appointed, is as much the representative of Her Majesty for all purposes of provincial government as the Governor-General himself is for all purposes of Dominion government." So you have there a general declaration that the executive powers are divided, and that that part which is necessary for the

due performance of the functions of the provincial government remains with the Province. Then their Lordships in the case in question, after stating, as I have said that the legislature of each Province of Canada is as supreme as it was before the passing of the Act, cite from [466] the now historic case of *Hodge v. The Queen* (1), and then go on to say in reference to the Legislature of New Brunswick, which was in question in *Liquidators of the Maritime Bank of Canada v. Receiver-General of New Brunswick* (2), that "it derives no authority from the Government of Canada, and its status is in no way analogous to that of a municipal institution which is an authority constituted for purposes of administration. It possesses powers, not of administration merely, but of legislation, in the strictest sense of that word; and, within the limits assigned by sect. 92 of the Act of 1867, these powers are exclusive and supreme." They then go on to say, as I have before said, that the British North America Act should contain very express language (which it does not contain) to deprive the province of its prerogative. What was supposed to be obiter in *Theberge v. Landry* (3), is the deliberate opinion of the Privy Council in this case, namely, that the Queen is a party to provincial legislation.

In that case of the *Liquidators of the Maritime Bank v. Receiver-General of New Brunswick* (2) we find in the judgment the following passage:—

"If the Act had not committed to the Governor-General the power of appointing and removing Lieutenant-Governors, there would have been no room for the argument, which, if pushed to its logical conclusion,

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(1) 9 App. Cas. 117; *ante*, vol. 3, p. 144.

(3) 2 App. Cas. 102; *ante*, vol. 2, p. 1.

(2) [1892] A.C. 437; *ante*, p. 1.



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would prove that the Governor-General, and not the Queen, whose Viceroy he is, became the sovereign authority of the Province whenever the Act of 1867 came into operation. But the argument ignores the fact that by sect. 58 the appointment of a Provincial Governor is made by the 'Governor-General in Council by instrument under the Great Seal of Canada,' or in other words by the executive government of the Dominion, which is, by sect. 9, expressly declared 'to continue and be vested in the Queen.' There is no constitutional anomaly in an executive officer of the Crown receiving his appointment at the hands of a governing body who have no powers and no functions except as representatives of the Crown," and then follows what I have already read on this point.

Then the judgment proceeds to discuss the point as to the vesting or non-vesting of the public property and revenues of each Province in the Sovereign, which [467] their Lordships say appears to be practically settled by previous decisions of the Judicial Committee, referring particularly to the *Attorney-General of Ontario v. Mercer* (1); *St. Catherine's Milling and Lumber Company v. The Queen* (2), and *Attorney-General of British Columbia v. Attorney-General of Canada* (3), and the judgment closes as follows:—

"Seeing that the successive decisions of this Board, in the case of territorial revenues, are based upon the general recognition of Her Majesty's continued sovereignty under the Act of 1867, it appears to their Lordships that, so far as regards vesting in the Crown, the same consequences must follow in the case of provincial revenues which are not territorial."

(1) 8 App. Cas. 767; *ante*, vol. 3,  
 p. 1.

(2) 14 App. Cas. 46; *ante*, vol. 4,  
 p. 107.

(3) 14 App. Cas. 295; *ante*, vol. 4, p. 241.

That is important as giving us at last an interpretation on which we can rely for the construction of this case.

The learned counsel then proceeded to submit the points of argument relied on in the Court of Appeal. (1)

STRONG, C. J. :—

The 15th sub-section of sect. 92 of the British North America Act and the decision in the case of *Hodge v. The Queen* (2), preclude the possibility of any doubt as to the right of provincial legislatures to impose punishments by fine and imprisonment as sanctions for laws which they had power to enact.

The case of *Liquidators of the Maritime Bank of Canada v. Receiver-General of New Brunswick* (3), definitively established that a provincial Lieutenant-Governor appointed by the Governor-General under the great seal of the Dominion pursuant to the provisions of the British North America Act, represents the Queen.

[468] The 65th section of the British North America Act which continues to the Lieutenant-Governors of the Provinces such statutory powers after confederation as had previously been vested in the Lieutenant-Governors so far as the same are capable of being exercised after the union, does not appear to me to have any material bearing, as the prerogative of pardoning exercised by the Lieutenant-Governor before confederation was not derived from any statute.

Had I been compelled to decide the substantial question argued before this court, I should have had no hesitation in holding that “the power of commuting and remitting sentences” mentioned in the second section of

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(1) See report of argument 20 Ont. Rep., pp. 229, *et seq.*

(2) 9 App. Cas. 117; *ante*, vol. 3, p. 144.

(3) [1892] A. C. 437; *ante*, p. 1.



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the provincial Act, in question, was nothing less than the power to pardon.

By the law of the constitution, or, in other words, by the common law of England, the prerogative of mercy is vested in the Crown, not merely as regards the territorial limits of the United Kingdom, but throughout the whole of Her Majesty's dominions. The authority to exercise this prerogative may be delegated to viceroys and colonial governors representing the Crown. Such delegation, whatever may be the conventional usage established on grounds of political expediency, a matter which has nothing to do with the legal question, cannot, however, in any way exclude the power and authority of the Crown to exercise the prerogative directly by pardoning an offence committed anywhere within the Queen's dominions. I take it to be the invariable practice, in the case of colonial governors to delegate to them the authority to pardon, in express terms, either by the commission under the great seal, or in the instructions communicated to them by the Crown. This being so, and this practice having prevailed as far as I can discover universally and for a long series of years, I should [469] have thought that it at least implied that in the opinion of the law officers of the Crown, an authority on such a point second only to that of a judicial decision, that the prerogative of pardoning offences was not incidental to the office of a colonial governor, and could only be executed by such an officer in the absence of legislative authority, under powers expressly conferred by the Crown.

The next question, and one which was argued on this appeal, and which, if we were compelled to decide all the questions presented we should have been obliged to

pronounce upon, is one of the greatest importance, not a question of construction arising in any way upon the British North America Act, but one involving a great principle of the general constitutional law of the Empire. That question is: in what legislature does the power of conferring this prerogative of pardoning by legislation upon a representative of the Crown such as a colonial governor, reside? Is it possessed by any colonial legislature, including in that term under our system of federal government as well the Dominion Parliament as a Provincial Legislature, or is it confined to the Imperial Parliament? That the Crown, although it may delegate to its representatives the exercise of certain prerogatives cannot voluntarily divest itself of them seems to be a well recognised constitutional canon. Upon this point of the locality of the legislative power to interfere with the Royal prerogative, I should have thought that the case of *Cushing v. Dupuy* (1), and *In re Marois* (2), decided by the Judicial Committee with reference to the jurisdiction of a colonial legislature to limit appeals to the Queen in Council, would, if not direct authorities, have had at least a very material application to the present question. The judgments delivered in the Supreme Court of [470] Victoria in the case of *Chung Teeong Toy v. Musgrove* (3) might also have afforded us great assistance. If it had been necessary to decide this last question, I should have desired further argument in order that the opinions of the learned judges who decided the Australian case, and the authorities which with great industry and research they appear to have brought together might be fully discussed, for that case was not referred to in the argument,

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(1) 5 App. Cas. 409; *ante*, vol. 1, p. 252.

(2) 15 Moo. P. C. 189.

(3) 14 Vict. L. R. 349; [1891] A. C. 272. See *post*, Appendix.



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having been brought to our notice by the learned counsel for the appellant since the hearing of the appeal.

I have made the foregoing observations in order that the attention of counsel may be directed to the points I have indicated should the case be brought before us again in some other form. At present I do not intend to decide any of these questions, for I am of opinion that we must dispose of this appeal upon the same ground as that taken in the judgment of Mr. Justice Osler.

This is an action instituted under the jurisdiction given by sect. 52, sub-s. 2, of the Ontario Judicature Act, which is as follows:—

“The High Court shall have jurisdiction to entertain an action at the instance of either the Attorney-General for the Dominion or the Attorney-General of the Province for a declaration as to the validity of any statute or any provision in any statute of this legislature, though no further relief should be sought or prayed; and the action shall be deemed sufficiently constituted if the two officers aforesaid are parties thereto. A judgment in the action shall be appealable like other judgments of the said court.”

The Attorney-General of the Dominion by his statement of claim asks for a declaration as the validity of the statute under consideration and every section thereof.

Whatever may have been the proper determination of this question, if the statute had been absolute in its [471] terms it seems to be impossible to say that an enactment which on its face is expressly made subject to a condition that the legislature has power to enact it, can be *ultra vires*. The effect of such a proviso necessarily is that the Act is by its very terms to be treated as an absolute nullity

if beyond the competence of the legislature; it is therefore impossible to say that there has been any excess of jurisdiction.

The appeal must be dismissed.

*(Translated.)*

FOURNIER, J. :—

This action has been brought for the purpose of obtaining a declaration that the Act 51 Vict., c. 5 is beyond the competence of the Legislature of Ontario. The answer of the Attorney-General of Ontario contained in his demurrer is sufficient to defeat the claim put forward. The object of this Act is not to settle the meaning of the British North America Act or to amend it in any way beyond the powers which belong to the said legislature. It has expressed this in the most positive manner by the declaration several times repeated in this Act that it has only legislated so far as it had power as a Province to do so and without interfering with the powers reserved to the federal parliament.

Since the legislature has declared that it had no intention of giving effect to its legislation further than it has power to do so, and especially when the question is not as to the application of the Act to a particular case, it is evident that the petition for a declaration of unconstitutionality is premature. It seems to me that the adoption of such a proceeding should have been delayed until a case arose in which this Act was relied on. Until then it seems to me that the Court cannot be asked to make a declaration affirming what the legislature had refrained from declaring. What has been thus declared [472] provisionally or by way of trial cannot be of great use, but was within the competence of the legislature.

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As was said by Chancellor Boyd in his learned judgment in this case: "And again if the section operates on nothing it may be innocuous but it is not unconstitutional. We are not called upon by analysis or criticism of plausible powers and functions which may be embraced in the words used to discriminate as to what are within or what without the scope of the enactment; any particular case is to be dealt with as and when it arises."

I am therefore of opinion that the action praying a declaration that the Act in question is unconstitutional should be dismissed and the judgment of the Court of Appeal affirmed.

TASCHEREAU, J.:—

I am not sure if we have jurisdiction over this appeal. If not quashed, however, it must be dismissed. There is nothing in it, and I would have dismissed it at the conclusion of the appellant's argument without calling on the respondent. I would have thought that after the decision of the Privy Council in the *Maritime Bank Case* (1), the appeal would have been abandoned. If it was thought expedient to have a judgment finally settling the questions raised the case should have been directly brought to the Privy Council. Constitutional questions cannot be finally determined in this Court. They never have been and never can be under the present system.

GWYNNE, J.:—

The Act of the Ontario Legislature which is under consideration, viz.: 51 Vict., c. 5, is, to say the least, peculiar in its frame and embarrassing, and the argument in support of its constitutionality has failed to bring conviction to my mind. The first section of the Act purports to

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(1) [1892] A. C. 437; *ante*, p. 1.

enact ("so far as the legislature has power thus to enact") that all powers, authorities and functions which [473] were vested in, or exercisable by the Governor or Lieutenant-Governor of any of the several provinces now forming part of the Dominion of Canada under commissions, instructions or otherwise, at or before the passing of the British North America Act in respect of like matters as the matters by that Act placed within the jurisdiction of the legislature of the province shall be vested in and exercisable by the Lieutenant-Governor of the Province of Ontario. What may have been the powers, authorities and functions thus intended to be vested in the Lieutenant-Governor of the Province of Ontario, the section does not indicate; but it must be construed as treating them to have been powers, authorities and functions which have been exercised in virtue of some special authority, emanating directly from the Crown, empowering a Governor or Lieutenant-Governor of some or one of the old provinces upon some occasions or occasion to exercise some royal prerogative in some manner, and the power, authority or function so authorized to have been executed by such Governor or Lieutenant-Governor must have been other than, and in excess of, the powers, authorities and functions vested in the Lieutenant-Governors of Ontario and Quebec by sect. 65 of the British North America Act.

Now the legislatures of the provinces have no jurisdiction to enact laws in relation to any matter not coming within the classes of subjects enumerated in sect. 92 of that Act, and among such subjects there is not one, in my opinion, which includes the matters purported to be enacted by the first section of the Act under consideration; but, on the contrary, so to extend the powers,

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authority and functions of the Lieutenant-Governor of Ontario beyond those expressly vested in him by the constitutional Act is, in my opinion, a violation of the [474] terms of the 1st item of sect. 92 of that Act, which vests in the legislature jurisdiction to amend from time to time the constitution of the province, save and except "as regards the office of Lieutenant-Governor." An Act which purports to vest in a Lieutenant-Governor of the province the royal prerogative in excess of so much thereof as is expressly or by necessary implication vested in him by the British North America Act must, I think, be held to be an alteration of the constitution of the province as regards the office of Lieutenant-Governor. Then it is argued that even if this is a correct construction of the first section so that it cannot be held to be *intra vires*, still by reason of the above formula used in the statute, that section cannot be adjudged to be *ultra vires*. The argument being:—If the legislature has power to enact as it has enacted in the first section, that section is *intra vires*; but if the legislature had not the power so to enact, the section cannot be *ultra vires* by reason of the saving effect of the formula "so far as the legislature has power thus to enact." Thus an Act of a provincial legislature which under the shadow of such a formula deals with a subject clearly not within the jurisdiction of the provincial legislature to legislate upon, must, according to the argument, be suffered to remain upon the statute book as an Act of the legislature for what purpose it is difficult to conceive. Thus if an Act of a provincial legislature should under cover of the formula "as far as the legislature has power thus to enact," enact and declare that within the province no offence should be punishable with death, but that every offence hereto-

fore so punishable should be punished by imprisonment in a common gaol for such period as the court or judge pronouncing the sentence should deem fit, such an Act, according to the argument, could not be adjudged to be ultra vires, but must be suffered to remain on the statute [475] book as an Act of the legislature. It clearly cannot be said to be intra vires and I confess to be unable to see how an Act which is not intra vires can be anything else than ultra vires.

The argument has failed, as I have said, to bring conviction to my mind. I think that the use of such a formula cannot divest the Court of power to pronounce an Act to be ultra vires, if the subject matter dealt with be not within the jurisdiction of the legislature to legislate upon; that is to say if an Act of a provincial legislature deals in any way with such a subject matter, the Act not being intra vires must be ultra vires. A provincial legislature having no jurisdiction to pass any Act in relation to a matter not coming within the classes of subjects enumerated in sect. 92 of the British North America Act, if they pass an Act in relation to any such matter, that is an Act beyond their jurisdiction to enact that is to say is ultra vires, notwithstanding that such a formula as the above is used. The Act under consideration while it contains the above formula proceeds to legislate upon a subject matter upon which, as I think, it had no jurisdiction to legislate, the formula used does not divest the Act of its character of being an Act of the legislature, nor can it make the subject with which it proceeds to deal to be within its jurisdiction, if in point of law it is not. This first section then of the Act under consideration is the legislative Act of a legislature having no jurisdiction over the subject matter

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with which the section professes to deal, and being so it is, in my opinion, ultra vires.

Then as to the second section. If that section had been framed so as to enact that the Lieutenant-Governor should have the power of commuting and remitting sentences passed under the authority of item 15 of sect. 92 of the British North America Act, there would have been, I apprehend, no objection raised to such an enactment, but the second section does nothing of the kind. [476] It professes to proceed solely upon the basis of the first section being intra vires. It professes not to give to the Lieutenant-Governor power to commute or remit the offences in the second section mentioned independently of the power purported to be conferred by the first section. It enacts as follows :—

2. "*The preceding section shall be deemed to include the power of commuting and remitting sentences for offences against the laws of this province, or offences over which the legislative authority of the province extends.*" This mode of framing the section conveys the intention of the legislature to have been that it is only under the preceding section that the power mentioned in the second section is vested in and can be exercised by the Lieutenant-Governor. If then the preceding section be ultra vires nothing remains to support the provisions of the second section. But further, the second section purports to declare that the preceding section and the power thereby purported to be conferred shall be deemed to include the power of commuting and remitting sentences not only for offences over which the legislative authority of the province extends, that is to say those mentioned in item, 15 of sect. 92 of the British North America Act, but also "for offences against the laws of this province."

Such offences were always misdemeanors at common law, and now by sect. 138 of the Criminal Code are indictable offences, unless some penalty or other mode of punishment is expressly provided by law. So that this second section of the Act under consideration purports that the powers professed to be vested in the Lieutenant-Governor of Ontario by the first section shall *include* the power of commuting and remitting sentences passed in certain cases by the Courts in the exercise of their criminal jurisdiction, a matter clearly not within the jurisdiction [477] of the provincial legislature to legislate upon, and, therefore, *ultra vires*.

I am of opinion therefore, that the contention of the learned Attorney-General of Canada is well founded, and that the Act must be declared to be *ultra vires*.

KING, J. :—

Was of opinion that the appeal should be dismissed.

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#### JUDGMENTS IN ONTARIO COURT OF APPEAL.

[Reported 19 App. Rep. 31.]

HAGARTY, C. J. :—

The Act in question, 51 Vict. c. 5, begins by reciting sect. 65 of the federation Act, that all powers, etc., which under any Act of the Imperial Parliament or of the Legislature of Upper Canada, Lower Canada, or Canada, were, before or at the union, vested in or [32] exercisable by the respective Governors or Lieutenant-Governors of these Provinces, should, as far as the same were capable of being exercised after the union in relation to the government of Ontario and Quebec, be vested in and exercised by the Lieutenant-Governor, etc., subject, nevertheless, to be abolished or altered by the respective Legislatures of Ontario and Quebec, except with respect to such as existed under Acts of Great Britain, or Great Britain and Ireland.



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The Act then proceeds :—

“And whereas by sect. 92 of the said Act, it was provided that in each Province of the Dominion of Canada, the Legislature may exclusively make laws in relation to matters coming within the classes of subjects thereafter mentioned ;

“Therefore, Her Majesty, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows :—

“1. In matters within the jurisdiction of the Legislature of the Province, all powers, authorities and functions, which in respect of like matters, were vested in or exercisable by the Governors or Lieutenant-Governors of the several Provinces now forming part of the Dominion of Canada or any of the said Provinces, under commissions, instructions or otherwise, at or before the passing of the said Act, are, and shall be (so far as this Legislature has power thus to enact) vested in and exercisable by the Lieutenant-Governor or administrator for the time being of this Province, in the name of Her Majesty or otherwise, as the case may require ; subject always to the Royal Prerogative as heretofore.

“2. The preceding section shall be deemed to include the power of commuting and remitting sentences for offences against the laws of this Province, or offences over which the legislative authority of the Province extends.

“3. Nothing in this Act contained shall be construed to imply that the Lieutenant-Governor or administrator has not had heretofore the powers, authorities and functions in the preceding two sections mentioned.”

Reading the preamble and this sect. 1 together, I think we [33] cannot hold that the Ontario Legislature assume any authority to go beyond the scope of the 65th section set out in the preamble. All matters within the legislative powers, functions, and authorities vested in Lieutenant-Governors, are and shall be (so far as this legislature has power to enact) vested in and exercisable by the Lieutenant-Governors, subject always to the royal prerogative.

This construction may be open to the criticism that it is then a mere repetition of the law as declared by the 65th section. But the Courts are not to assume that the legislature intended to transcend

their legal powers, and even if it be an unnecessary repetition, it cannot, merely on that account, be held to be invalid.

The demurrer filed on behalf of Ontario, specially disclaims all intention of going beyond the powers conferred by the federation Act.

I therefore agree in holding the objection of unconstitutionality so far to fail.

The chief matter in controversy in this litigation, is the provision in sect. 2 of the Act. I do not think it is fairly open to the objection that it professes to deal with "offences against the laws of this province," thus including the whole criminal law which governs Ontario.

It seems to me that we should read these words as expounded by the following: "or offences over which the legislative authority of the province extends;" the latter words restraining the generality of the earlier words in effect as if we read "being" instead of "or" — "Offences against the laws of this province, *being* offences over which the legislative authority of the province extends." It is an Act professedly enacting, "so far as this legislature has power thus to enact."

To accept the construction contended for by the appellant would be insisting on giving a meaning to the words used, which in my judgment, was neither intended by the lawmakers, nor necessarily results from their language.

[34] I therefore read sect. 2 as confined to offences over which the legislature of Ontario has control under sect. 92, sub-sect. 15, B. N. A. Act.

From the very eminent counsel engaged in this case we have heard a most luminous and instructive disquisition on the relative positions of the Provinces and the Dominion. It may be fairly assumed that nothing has been left unsaid bearing on the proper interpretation of the constitutional problem involved.

We have also had the great advantage of a perusal of the very able and well considered judgment of the learned Chancellor.

It remains now to apply the copious information thus supplied to us to the questions submitted. As far as I am concerned I do not propose to range over the wide field of discussion thus opened to us, beyond what a decision of the case necessarily requires. I wish to keep strictly to the question: Has the legislature the power to

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enact that the Lieutenant Governor in Council has the power of commuting and remitting sentences for offences over which the legislative authority of the province extends?

In the case of *Regina v. Wason* (1), I used this language :—"Notwithstanding the reservation of criminal procedure to the Dominion Parliament, must we not hold that there must be a necessary implication of power to the legislature so far to regulate criminal procedure (if that be its proper name) as to provide for the course of trial and adjudication of offences against its lawful enactments? I think we can well keep the two jurisdictions distinct and as to each adhere to the rule that where either has the right to legislate on a named subject, it must by necessary implication be held that all powers are given fully to carry out the object of the enactment, although subjects such as civil rights, and procedure, civil or criminal, may be apparently interfered with. The exclusive right to deal with the specified subjects remains wholly unaffected—the carrying the legislation into practical effect, and providing necessary penalties for its observance, is alone in question."

As I adhere fully to these views, I refer to them instead of [35] repeating them here. We held in effect that the legislature had the right to provide the mode of procedure applicable to the final hearing and determination of the guilt or innocence of parties violating its laws.

The learned Chancellor says :—"It could not be seriously or successfully questioned that in the Act under discussion in *Regina v. Wason* (1), the legislature might not have framed sect. 8 so as to provide that the penalties therein imposed should not be enforced in any case wherein the Lieutenant-Governor thought fit to remit the same. If this can be done by proviso or in particular cases, it may be done by direct and general legislation."

It appears to me, on the best consideration I can give it, that it will not be illegal or invalid for the legislature so to allow remission and commutation of sentences in this class of provincial criminal procedure.

Mr. Robinson, in his very able argument, is reported to have urged that—even conceding that the legislature might make the punishment imprisonment at the discretion of the Lieutenant-

(1) 17 App. Rep. 221, 232; *ante*, vol. 4, pp. 578, 590.

Governor, or a fine, to be lessened or varied by him or any named officer, it did not touch this point, for there the remission would be by virtue of the sentence itself, and not by the exercise of any prerogative power. He then discusses the effect of a pardon as wiping out the original offence, etc.

If the same thing can be done by altering the wording of the legislation and so moulding the sentence, the whole thing seems narrowed down to a mere verbal difference.

I think we are liable to be led aside from the true point at issue by treating it as involving all the formalities and consequences of a pardon under the great seal.

To my mind there is an essential difference between pardons, as universally understood, and the remission or commutation of a term of imprisonment, or of a pecuniary mulct.

I do not understand that the discharge of a prisoner from further endurance of his sentence, which may occur for various cogent [36] reasons, can properly be looked upon or described as a pardon.

The statute here questioned does not mention a pardon, but speaks merely of commutation and remission.

I must therefore decline following counsel into the wide field of discussion and its boundless crop of venerable learning as to pardon and prerogative. I have only to deal with the language used in the impugned statute. It seems to me on the whole, that we must hold that the necessary implication from the provisions of the federation Act must be that the legislature in this enactment as to commutation and remission has not transcended its legitimate powers.

I do not feel pressed by the objection that it is within the restriction (in sect. 92, sub-sect. 1, of the B. N. A. Act) on the powers to amend the constitution, except as to the office of Lieutenant-Governor. I think this is satisfactorily disposed of in the Court below.

I have confined these remarks within a narrow limit, as I do not consider that the question submitted warrants us to enter on a larger area of discussion.

I have tried to base my decision on the opinions expressed from time to time by Her Majesty's Privy Council as to the true construction of the confederation Act, and of the relative rights and powers of the Dominion and Provincial Governments.

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Any individual opinions that I or other Judges have ever held on this difficult and vitally important subject are now of little moment in the light thrown upon this question by successive decisions of the final court of appeal. By that light we have now to be wholly guided.

I think the demurrer must be allowed, and this appeal dismissed.

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BURTON, J. A. :—

Hagarty, C. J.

If the judgment of this Court in *Regina v. Wason* (1), be correct, it seems impossible to say that the Act in question was beyond [37] the powers of the Ontario Legislature. I fully concur in the judgment of the Chancery Division delivered by the learned Chancellor who has dealt with the question so ably and so exhaustively that I fear that I cannot profitably add anything to what he has said. But I wish to express the opinion that, even if the enactment is open to the criticism of being vague or indefinite, that in itself could be no reason for declaring it void, keeping in view the general principle to be applied in determining questions relating to the constitutional validity of Acts of the Parliament of the Dominion or of the Provinces, every presumption being made in favour of their validity.

But I do not think that it is, when read as a whole, fairly open to the objection.

Sect. 65 is accurately stated in the preamble, and defines the powers with which it is proposed to deal; and having thus defined the powers, and referred to sect. 92, which places certain matters exclusively under the jurisdiction of the provincial legislature, it enacts that in all matters within that jurisdiction, all powers, authorities, and functions which, in respect of like matters, were vested in or exercisable by the Governors or Lieutenant-Governors of the several provinces now forming the Dominion of Canada, or any of the said provinces *under commissions, instructions, or otherwise*, at or before the passing of the said Act, are and shall be (so far as this legislature has power to enact) vested in the Lieutenant-Governor in the name of Her Majesty, or otherwise, as the case may require, subject always to the royal prerogative, as heretofore.

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(1) 17 App. Rep. 221; *ante*, vol. 4, p. 578.

The principal objection, as I understand it is that under the words which are italicised, the powers are extended, those powers granted and referred to in the B. N. A. Act being confined to statutory powers. Even on the assumption that that is the proper construction to be given to that Act, this would appear to be very harmless legislation, as it is only those powers which were capable of being exercised after the union in relation to the government of Ontario that the legislature professes to deal with.

[38] I do not agree with the construction placed upon the confederation Act by the learned counsel for the appellant, as I have always been of opinion that the legislative and executive powers granted to the provinces were intended to be co-extensive, and that the Lieutenant-Governor became entitled *virtute officii*, and without express statutory enactment, to exercise all prerogatives incident to executive authority in matters in which provincial legislatures have jurisdiction; that he had in fact delegated to him the administration of the royal prerogatives as far as they are capable of being exercised in relation to the government of the provinces, as fully as the Governor-General has the administration of them in relation to the government of the Dominion.

I can see nothing, therefore, in this first section of the Act which is beyond the power of the legislature to enact. If the Lieutenant-Governor should attempt to do any thing in excess of the powers granted, such act would be illegal and void; but it would be because he had no authority to do it, either under the confederation Act, or the Act which is now impeached, but it can be no objection to the Act itself.

The first section does not attempt to enumerate, and it would not be possible to enumerate, every case which it was intended to cover; but it is only those which I have referred to, and which the legislature has jurisdiction to deal with, and the objection fails when we apply the maxim *id certum est quod certum reddi potest*.

In my view no legislation was necessary; but to remove doubts, such an Act seems desirable and free from objection.

When we come to the second section, we find something defined; it is one of those things intended to be covered by the first, but, in dealing with it, we are called upon to say whether it is something coming within the jurisdiction of the province.

The section does not profess to deal with commuting or remitting

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sentences for crimes, as that term is understood within the criminal law of the Dominion ; but offences made offences by the laws of the province, or to which the legislative authority extends. So [39] limited, it appears to me, that the subject was clearly, if our decision in *Regina v. Wason* (1), be good law, within the jurisdiction of the province to enact. I quite agree with the learned Chancellor, that "in the political aspect it is a fitting thing, if permissible, to bestow this dispensing power upon the chief executive of the body wherefrom the legislation which is sought to be arrested emanates;" but upon the proper construction of the confederation Act, it seems to me that it was intended that this power should lie exclusively with the executive and legislature which creates the offence or whose law is violated.

As pointed out in *Hodge v. The Queen* (2), the power to pass laws implies necessarily the power to enforce them or to suspend their execution. To entrust that power to another government would be destructive of the whole system of federal government.

Counsel on both sides quoted from Mr. Dicey's recent work, who, in advancing the proposition that the powers of our Dominion and Provincial Legislature are not sovereign or supreme is, with deference, treating the subject as we were wont to treat pleadings in the days of special demurrer. And I think I may take the same exception to the remark as to the official mendacity of the framers of our constitutional Act, in using the expression "with a constitution similar in principle to that of the United Kingdom," for which he thinks "United States," would better express the truth.

Perhaps the criticism might have been more appropriately applied to Governor Simcoe's eulogium on the constitutional Act of 1791, when he referred to it "as the very image and transcript of that of Great Britain." This is not the place to offer any criticism, but had the occasion been a proper one, I trust I should do so in more courteous terms than those which Mr. Dicey has thought fit to apply to the framers of our present constitution.

To use the language of the Chancellor, I come to the irresistible conclusion that the Act is within the competence of the Ontario Legislature.

(1) 17 App. Rep. 221 ; *ante*, vol. 4, p. 578.

(2) 9 App. Cas. 117 ; *ante*, vol. 3, p. 144.

[40] OSLER, J. A.:—

The plaintiff brings this action in order to have it declared that the Act 51 Vict. c. 5 (O.) is beyond the competence of the Provincial Legislature to enact. In my opinion the answer to the action, or a sufficient answer to it, is found in one of the grounds expressly taken in the demurrer of the Attorney-General of Ontario, namely, that the Act does not purport either to declare the meaning of the B. N. A. Act, or to amend the same, or to deal therewith in any way beyond the competence of the legislature so to do; and the saving clause in that respect covers both of the enacting sections.

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Where the legislature in passing an Act are careful to say that they only mean it to be effectual so far as they have power to make it so, and no attempt has been made to act upon or to enforce it, it appears to me to be premature to ask for a declaration of its invalidity.

The time to question that, in my humble opinion, is when its validity is asserted in some proceeding which is attempted to be justified under it. Until then, I think, with all deference, no Court ought to be asked to declare affirmatively or conclusively what the legislature has not ventured to assert, that what is thus tentatively or provisionally enacted is absolutely within their power to enact. The Act may operate upon nothing and, as the learned Chancellor has observed, it may be innocuous, but it is not for that reason unconstitutional.

I therefore agree that this action, seeking as it does a declaration that the Act is unconstitutional, ought to be dismissed, and the judgment, for the reason I have given, affirmed.

MACLENNAN, J. A.:—

At the conclusion of the argument I had no doubt that the judgment ought to be affirmed, and subsequent consideration has not altered my opinion. I therefore think the appeal should be dismissed.

## JUDGMENTS IN CHANCERY DIVISION.

[Reported 20 Ont. Rep. 222.]

BOYD, C.:—

This action is brought under sect. 52 (2) of the Judicature Act (R. S. O. 1887, c. 44) for a declaration touching the validity of



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the statute of Ontario passed in 1888 (51 Vict. c. 5) entitled "An Act respecting the executive administration of the laws of this Province."

The validity of provincial legislation depends upon its being *constitutional*, using that word in a strict sense, namely, whether as the expression of the will of an inferior political assembly, the given law transcends or is within the compass of delegated power.

[245] In relation to the supreme authority of the British Parliament, Canada in its composite character forms a complete and separate subordinate government, possessing a "central legislature" for the whole Dominion, and "local legislatures" for the several members of the colonial union. These various legislatures hold in sub-division among them powers applicable to all classes of subjects and to every purpose of government required for the entire territory and its several provincial parts; but as between the Dominion and the Provinces, each is an incomplete or limited government, having exclusive jurisdiction over certain enumerated classes of subjects, defined in general terms by the Imperial Constitutional Act. Barring, however, this delimitation of area, the Parliament of the Dominion and Legislatures of the Provinces enjoy, each in its own sphere and territory, delegations of sovereign power sufficient for all purposes of effective self-government.

Passing by, as not of present relevance, the right of supervision touching provincial legislation entrusted to the Dominion Government, which works in the plane of political expediency as well as in that of jural capacity, the question for the Court is whether the particular enactment is within the range of governmental powers exercisable by the local legislatures under the B. N. A. Act.

At the outset there are some recognised rules of guidance to be observed in passing upon the exercise of legislative powers. Comment was made upon the ambiguity of the Act, the difficulty of ascertaining what was covered by its general language, and upon the need of shewing plainly that the limited jurisdiction prescribed by the written law had not been exceeded. But so far as frame and phraseology go the result of ancient observation—"Jurisconsultis non curat de verbibus"—avails for modern makers of the law. Language, large or loose, is to be shaped by presuming an intention to act with candour and within the bounds of constitutional com-  
[246] petence. Vague or ambiguous expressions are to be read so as

to support rather than to invalidate what is promulgated, and the court in case of reasonable doubt will refrain from pronouncing against the statute.

The Act is full of cautionary phrases—saving the royal prerogative and limiting its provisions to matters within provincial jurisdiction. After reciting sects. 65 and 92 of the B. N. A. Act, the first section provides for vesting in the Lieutenant-Governor all powers, &c., exercisable by Governors and Lieutenant-Governors of the several provinces before confederation, under commissions, instructions or otherwise. Sect. 65 of the Imperial Act had already vested in the Lieutenant-Governor all suitable executive powers derived from statutes, and this present Act aims at an extension in the same line so as to clothe the chief executive officer of Ontario with all suitable powers, &c., derived from other than statutory sources.

It is, perhaps, impossible to say how much ground this covers : it may be that (apart from what is specifically named in the next section) not a single appropriate power exists, outside of statutes, which will fall within the provisions of this enactment. But its vague comprehensiveness does not make it void if there be suitable powers in matters within the jurisdiction of the province, which are thus annexed to the executive office. And, again, if the section operates on nothing, it may be innocuous, but it is not unconstitutional. We are not called upon by analysis or criticism of plausible powers and functions which may be embraced in the words used to discriminate as to what are within and what without the scope of the enactment ; any particular case is to be dealt with as and when it arises.

But it was urged that the 65th section permits the province to work change in the powers, &c., annexed to the executive office only by *abolition* or *alteration*, and not by *addition*. The Imperial Act speaks of statutory powers, and the right is recognised to deal with and modify all prior colonial, but not Imperial legislation, on [247] this subject. No restriction appears to be imposed or intended on the freedom of local legislation in attaching further proper powers and functions to the office of the Lieutenant-Governor, provided only that it does not transcend the limits of legislation assigned to the province : *Dobie v. Temporalities Board* (1). As to

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all subordinate lawmaking it is a general principle not without point as to this phase of the discussion that though such laws may be præter the general law of the realm, they cannot be contra : Bac. Abr. Tit. "By-law." But even in rigorous construction "to alter" would include "to add." Alteration may be by addition or subtraction. For instance in Dr. Murray's Dictionary the former verb is defined "to make some change in character, shape, condition, position, quantity, value, &c., without changing the thing itself for another." No change is here aimed at in the office, as such ; but rather important and congruous functions are sought to be added thereto, to be administered by the chief public officer by whom, through the Dominion, the Province is connected with the Queen.

What has just been said answers also the argument based upon sect. 92, sub-sect. 1, of the Imperial Act, which forbids interference with the office of Lieutenant-Governor. That veto is manifestly intended to keep intact the headship of the provincial Government, forming as it does the link of federal power ; no essential change is possible in the constitutional position or functions of this chief officer, but that does not inhibit a statutory increase of duties germane to the office.

I pass from the generalities of the first to the second section, which gives point to the former by indicating that it is meant to include the power of commuting and remitting sentences "for offences against the laws of the province, or offences over which the legislative authority of the province extends." These last words (much criticised during the argument) may be fairly read as in *pari materia* with like expressions in R. S. O. 1887, cap. 89 and 90. Statute cap. 89 provides for the application of fines where by [248] any Imperial statute in force in Ontario a fine is imposed in respect to matters within the legislative authority of Ontario. Statute cap. 90 provides for the remission of penalties by the court in cases where such forfeiture is imposed by any Act of the province, or by any other Act now in force in the province within the legislative authority of the province. That is to say, the words criticised apply to existing laws enacted by the province or to laws operating therein passed by (old) Canada or Great Britain in regard to matters which fall within those assigned to provincial legislation by the B. N. A. Act. All such former laws are continued by sect. 129 of that Imperial Act, and instead of further specification they are thus

by allusion comprehended in sect. 2 of the Act in hand, in order that the executive of Ontario may possess like power quoad all penal enactments which are or might be of provincial competence.

In the political aspect it is a fitting thing if permissible to bestow this dispensing power upon the chief executive of the body wherefrom the legislation that is sought to be arrested emanates. As put by Maine, the theory of justice ended in the doctrine that the chastisement of offences belonged in an especial manner to the Sovereign as representative and mandatory of his people. Whence it followed that the power reserved as an ultimate remedy for the miscarriages of law in the prerogative of pardon was universally lodged with the chief magistrate of the particular state : Ancient Law (1) pp. 368, 382. According to the British constitution pardons may proceed from the Crown by virtue of its prerogative or from Parliament, the more comprehensive body, in the exercise of its supreme authority. The pardoning power as exercised by the Crown has certain legal limitations, among which those of immediate pertinence are exceptions which exist to the remission of penalties where the offence savours more of a private or localised grievance to individuals than of a public wrong : 2 Hawk. P. C. [249] cap. 37, sect. 33 ; 3 Inst. at p. 234. Put in the "omnipotence of Parliament" dispensations may be granted by statute, general or special, which are all embracing in their effects, exempting from punishment not only as to the public but as to sections of the community and as to individuals particularly aggrieved. Modern instances of this class of legislation are to be found in various Acts of amnesty and indemnity passed even by colonial powers, many of which are collected in *Phillips v. Eyre* (2), and specially analogous to the statute now in hand is the Imperial Act of 1859 to be hereafter further mentioned.

Now, it is a well settled principle of public law that after a colony has received legislative institutions, the Crown (subject to the special provisions of any Act of Parliament) stands in the same relation to that colony as it does to the United Kingdom : *In re the Lord Bishop of Natal* (3). Effective colonial legislation as to pardon may be attributed to the fact that the Crown is a constituent of the local law-making body ; but it is contended such is not

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(1) 3rd American, from 5th London edition.

(2) L. R. 4 Q. B. 225.

(3) 3 Moo., P. C. C., N. S. 116, 148.



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the case as to Ontario. Though as compared with the Dominion the mechanism may be different, and no direct or immediately representative co-ordination of Queen and people may exist in the Provincial Assembly, yet sovereign power must substantially operate and be manifested in Ontario legislation in order to the efficient exercise of territorial government under the sanctions of the Imperial Act. The power to pass laws implies necessarily the power to execute or to suspend the execution of those laws, else the concession of self-government in domestic affairs is a delusion. Sovereign power is a unity, and though distributed in different channels and under different names, it must be politically and organically identical throughout the Empire. Every act of government involves some output of prerogative power. The prerogatives of the Crown may not have been in any sense communicated to the Lieutenant-Governor as representative of the Queen, and yet the delegation of law-making and other sovereign [250] powers by the Imperial Parliament to the Legislature of Ontario may suffice to enable that body by a deposit of power to clothe the chief provincial functionary with all needful commuting and dispensing capacity in order to complete its system of government. That this "quality of mercy" is an indispensable constituent in human governments nearly all publicists acknowledge. I will cite, however, but one suggestive passage from Vattel: "The very nature of government requires that the executor of the laws should have the power of dispensing with them, when this may be done without injury to any person and in certain particular cases where the welfare of the State requires an exception. Hence the right of granting pardon is one of the attributes of sovereignty. But in his whole conduct, in his severity as well as his mercy, the Sovereign ought to have no other object in view than the greater advantage of society": The Law of Nations, Bk. 1, cap. 13, sect. 173. The Lords of the Judicial Committee have accentuated the provincial powers of self-government by repeating in *Powell v. Apollo Candle Co.* (1), what they had before decided in *Hodge v. The Queen* (2), in these words:—"When the British North America Act enacted that there should be a Legislature for Ontario and that its Legislative Assembly should have exclusive authority to

(1) 10 App. Cas. 282, 289; *ante*,  
 vol. 3, pp. 432, 441.

(2) 9 App. Cas. 117, 132; *ante*,  
 vol. 3, pp. 144, 162.

make laws for the province and for provincial purposes in relation to the matters enumerated in sect. 92, it conferred powers not in any sense to be exercised by delegation from or as agents of the Imperial Parliament, but authority as plenary and as ample, within the limits prescribed by sect. 92 as the Imperial Parliament in the plenitude of its power possessed and could bestow. Within these limits of subjects and areas the Local Legislature is supreme, and has the same authority as the Imperial Parliament." Very recently the Court of Appeal for Ontario in *Regina v. Wason* (3), has held valid provincial enactments imposing penalties for the [251] non-observance of directions and requirements of the legislature in subjects of a local character. That is to say, there is a theoretically well defined line of provincial penal legislation which does not trench on the region of criminal law as controlled by the Dominion Parliament. Within this area of provincial penal legislation there appears to be competence to pass the Act in question, which deals with the commutation and remission of sentences for offences against provincial laws.

The royal prerogative of pardon is a relic of that power of dispensing with the laws which was restrained within narrow compass by the Bill of Rights in 1688. In its origin, the pardoning power arose when crimes began to be regarded as offences against the State, and not as mere injuries to individuals, and when pecuniary satisfaction to the injured became displaced by deterrent remedies affecting the person of the offender. The King being the impersonation or representation of the State, all crimes and misdemeanours affecting the life and security of the subject, or the peace of the public, were accounted injuries to him. In his name all prosecutions were conducted, all punishments were awarded, and by him all dispensations of grace were granted. This last act of sovereignty proceeded upon the theory that he, the injured person in the eye of the law, could forgive a transgression which was reckoned against himself: 1 Bl., pp. 268 and 269. But concurrently with this royal exercise of mercy, the pardoning power was in use in other quarters, when the same reason applied as in the case of the Crown. Thus Earls Palatine and others in virtue of their possession of royal franchises, had a right of pardon within the limit of their local jurisdiction. So the right of pardon was

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(3) 17 App. Rep. 221; *ante*, vol. 4, p. 578.



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practically held by the prosecutor in the now obsolete proceedings in trials by appeal respecting crimes. He might grant a release which barred all proceedings, and this because one may renounce the benefit of a law which he has invoked in his own favour. The punishment awarded in such appeals the King had no right to remit, inasmuch as it was the party actually injured who had demanded satisfaction: 1 Bl., p. 269: iv. ib., pp. 12, 311, 391.

[252] These reasons still hold good for the new state of affairs presented by the development of self-governing dependencies, and are applicable to the statute under consideration. The local legislation which creates the offence has power to suspend the sentence, to commute or remit the punishment. It could not be seriously or successfully questioned that in the Act under discussion in *Regina v. Wason* (1), the legislature might have framed sect. 8 so as to provide that the penalties therein imposed should not be enforced in any case wherein the Lieutenant-Governor thought fit to remit the same. If this can be done by proviso or in particular cases, it may be done by direct and general legislation.

Again, the persons affected by breaches of the penal law of the province, are, at the widest, the public—not of Canada—but of Ontario. The exemption from punishment is therefore a matter of local and private moment. It is a transaction which concerns solely the people of the province, and as to which responsibility should rest somewhere for the satisfaction of those affected by interruption of the usual course of law. Consider how the prevention of punishment overtaking one convicted, in all cases apparently, in some cases really, frustrates the declared will of the legislator. But according to modern constitutional doctrines, the exercise of clemency should be neither arbitrary nor irresponsible. While it involves the exercise of discretion, that discretion should be quasi-judicial, tempering in proper exceptional cases the infliction of penalty on tangible grounds of humane policy or public morality, much as equity relieved the rigour of municipal law. "For remission of punishment," writes Bentham, "there may be good reason on various occasions, but they are all of them capable of being, and all of them ought to be, specified;" Works, vol. ix., p. 37. Interference with the execution of the laws should also be a transaction involving responsibility to the particular legis-

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(1) 17 App. Rep. 221; *ante*, vol. 4, p. 578.

lature and people interested therein. This would be evaded if the Crown as the Dominion executive should arrest the operation of [253] provincial penal legislation. Whereas the Crown as sovereign of Ontario, exercising the prerogative through the chief executive officer of the Province, specified for that purpose by the provincial statute would seem to supply the more appropriate and more constitutional medium of intervention. Is it not then the right course, legally and otherwise, to vest this dispensing power in the chief executive officer carrying on the government of the province, whose ministers and advisers will be answerable for his action? What then prevents this result? Not, it seems to me, because of any encroachment on the royal prerogative of mercy whether as defined in the instructions to the Governor-General of Canada or as otherwise exercised by the Crown under advice. The grant of pardon is under the royal instructions permitted in the case of those convicted of any crime. That word should bear the same meaning as when used in the British North America Act implying violation of a Dominion statute or of the common law relating to crime. So the power of remission thereby authorized is as to fines, etc., which may become due and payable to the Queen—i.e., to the Crown as representative of the public of Canada.

Now the scope of the Ontario statute under review comprehends no more than the case of offenders against provincial statutory law, actual or constitutionally possible; no more than penalties payable to the Crown as representing the province, or to municipalities, or to individuals who are aggrieved or who prosecute.

This exercise of provincial legislative power is analogous to that found in recent Imperial legislation and in particular 22 Vict. cap. 32 (1859), which in its recital demonstrates that the royal prerogative is not encroached upon by the Ontario statute in its application to pecuniary penalties. Thus reads the preamble: "Whereas penalties which under penal statutes are made payable to parties other than the Crown cannot be remitted or pardoned by the Crown where no express provision has been made by the statute for that [254] purpose, and it is expedient that the law as to the remission of such penalties should be amended and made uniform, therefore, &c." Provision is then made that penalties for offences imposed on a convicted offender may be remitted by the Crown in whole or in part though payable to parties other than the Crown.

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The royal prerogative in its large sense as exercisable in reference to crime this statute does not purport to interfere with. In many, if not in most cases, wherein it may be invoked, the punishment will be such that the dispensing power of the Crown could not properly extend thereto. For instance, when the penalty is to be paid one-half to the complainant and the other half to the treasurer of the local municipality in which the offence has been committed (as was the case in *Regina v. Wason*) (1) well understood legal restrictions exclude the interposition of the Crown. Should the particular instance peradventure be otherwise, and the royal prerogative right arise, then it is saved by the very words of the Act.

The argument pressed upon us was that nothing in sect. 92 of the Imperial Statute contemplated legislation in reference to the pardoning power in any case or in any sense however restricted. But this is, I venture to think, resting on the letter of the law and disregarding the liberal construction to be given to this as a broad constitutional statute, conferring and distributing high and large powers of government, both as to Canada and the provinces. It is to be read in the light of history, and with a view to adjust its parts to the life and growth of free political communities. The Act is framed both as to the central and local governments so as to confer "a constitution similar in principle to that of the United Kingdom." That constitutional system embodying representative institutions as well as responsible government was already enjoyed by the separate provinces before confederation; and while in certain respects, and as a consequence of the Federal Union, some ingredients were borrowed from the constitution of the United States, in substance the distinguishing principle of responsibility which is the [255] essence of British parliamentary government characterises the British North America Act. In brief, the executive is made accountable to the electorate. Power and responsibility go hand in hand.

The advisers of the Crown, through whom the general and the provincial governments are conducted, must answer for their advice to the popular assembly and ultimately to the people at large as organised for political purposes. All legislation which advances this end, having regard to the distribution of powers in the Imperial Act, is constitutional and legally unexceptionable. Holding in view

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(1) 17 App. Rep. 221; *ante*, vol. 4, p. 578.

these and other considerations already advanced or alluded to, I find no difficulty in classifying this statute as one made in relation to the imposition of punishment.

From another point of approach it may be covered by the provisions for the administration of justice in the province. Bentham's words are appropriate :—"What is called mercy is in many cases no more than *justice*: in all cases where the ground of pardon is the persuasion of innocence, entertained either notwithstanding the verdict or in consequence of evidence brought to light after the verdict:" Works vol. 2, p. 579. To the same effect an American Judge :—"Though sometimes called an act of grace or mercy, a pardon when properly granted is also an act of justice, supported by a wise public policy:" O'Key J, in *Knapp v. Hynes*. (1) And Bentham says again :—"No punishment, no government; no government, no political society. Punishment is everywhere necessary; the application of it is everywhere a necessary part of judicial procedure. But of that same procedure power of pardon is moreover a *requisite* part, that is to say, power of arresting the hands of the judge:" Works vol. 1, p. 528. I observe also that Prof. Amos in his book on the Constitution deals with the royal prerogative of mercy under the head of and in connection with the administration of justice: "Fifty Years of the English Constitution," pp. 427, [256] 428, 435. Other illustrations might be given of this manner of classification, but accumulation will not persuade if these do not. The novel question presented on this record and the earnest arguments addressed to us for and against the legislative capacity of the province as manifested in this instance have induced me to give at length the reasons which have led to the irresistible conclusion that the statute 51 Vict. c. 5 should be declared of the constitutional competence of Ontario.

FERGUSON and ROBERTSON, JJ., concurred.

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(1) 39 Ohio St. R. 377-381.

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## APPENDIX.

## PRIVY COUNCIL.

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1890

Nov. 13, 14, 19. MUSGROVE ..... *Defendant* ;

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AND

CHUN TEEONG TOY ..... *Plaintiff*.*On appeal from the Supreme Court of Victoria.*[*Reported [1891] A.C. 272*].*Law of Victoria—Chinese Act, 1881, s. 3—Aliens—Collector of Customs.*

By sect. 3 of the Victorian Chinese Act, 1881, a Chinese immigrant has no legal right to land in the colony until a sum of £10 has been paid for him.

Where the master of a vessel had committed an offence under the Act by bringing a greater number of Chinese immigrants into a port of the colony than the Act allows :—

*Held*, that the collector of customs was under no legal obligation to accept payment tendered by the master on behalf of any such immigrants, nor when tendered either by or for any individual immigrant :—

*Held*, further, that apart from the Act, an alien has not a legal right enforceable by action to enter British territory.

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\**Present* :—THE LORD CHANCELLOR, LORD HOBHOUSE, LORD HERSCHELL, LORD MACNAGHTEN, SIR BARNES PRACOCK, SIR RICHARD COUCH, and MR. SHAND (LORD SHAND).

APPEAL from a judgment of the Supreme Court (Nov. 5, 1888), (1).

The question in the appeal was whether the Colonial Government, as representing Her Majesty, had power to prevent the respondent, a Chinese immigrant, from landing on the shores of the colony under the circumstances averred in the appellant's statement of defence, which is recited in their Lordships' judgment.

The facts are stated in the judgment of their Lordships.

By sect. 3 of the Chinese Immigrants Statute, 1865, the word "immigrant" is defined to mean any male adult native of China or its dependencies or of any islands in the Chinese seas, not born of British parents, or any person born of Chinese parents.

By sect. 2 of the Chinese Act, 1881, it was provided that if any vessel which had on board a greater number [273] of immigrants than in the proportion of one such immigrant to every hundred tons of the tonnage of such vessel should arrive at any time in any port in Victoria, the owner, master, or charterer of such vessel should be liable on conviction to a penalty of £100 for each immigrant so carried in excess of the foregoing limitation.

By sect. 3 of the same Act it was enacted that before any immigrant arriving from parts beyond Victoria shall be permitted to land from any vessel at any port or place in Victoria, and before making any entry at the customs, the master of the vessel by which such immigrant shall so arrive shall pay to the collector or other principal officer of customs the sum of £10 for every such immigrant, and that no entry shall be deemed to have any legal effect until such payment shall have been made and such immigrant for whom such sum has been paid shall receive

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from the said collector or other principal officer a certificate to that effect. The "entry" referred to in this section is the report which, by the 40th section of the Customs Act, 1857 (Act No. 13), the master of every vessel is required to make before bulk is broken.

The respondent, in his statement of claim, alleged that he arrived in the port of Melbourne on the 27th of April, 1888, on board the British ship *Afghan*, and that the master of that vessel, in respect of the plaintiff, offered to pay and was always ready and willing to pay to the appellant as collector of customs the sum of £10, as provided by sect. 3 of the Chinese Act of 1881, but the appellant refused to receive the said £10 or to allow the respondent to land in Victoria.

In his defence the appellant admitted the allegations in the statement of claim except as to the offer of £10 and his refusal to accept the same. The construction put by the Full Court on the 4th paragraph of the defence was, first, that the appellant pleaded a justification under the orders of a Colonial Minister claiming to exercise an alleged prerogative of the Crown to exclude alien friends; and, secondly, that he denied the right of a court of law to examine his action, on the ground that what he had done was a so-called act of State.

All the judges agreed in holding that the second defence thus raised was not a good one, and that there was no [274] question of an act of State. Two of the judges—the Chief Justice and Kerferd, J.—held that the first defence was good. But the other judges—Williams, Holroyd, A'Beckett, and Wrenfordsley, JJ.—agreed in holding it a bad one; and that, therefore, judgment should be entered for the plaintiff. Kerferd, J., besides agreeing with the Chief Justice that the first defence was a good

one, thought that there was a third ground of defence, in that plaintiff's action in attempting to enter the colony was to be deemed unlawful. The other members of the Court did not treat this point as raised by the defence. Holroyd, J., was of opinion that the plaintiff had committed no unlawful act.

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Sir *Horace Davey*, Q.C., and *Wrixon*, Q.C., (of the Victorian bar), (*Gurner*, with them) for the appellant, contended that the respondent, as an alien, had no right of action against the appellant as an officer of the Queen, for preventing him from landing in Her Majesty's dominions. The respondent's claim was based on this, that on his arrival the appellant refused to allow him to land or to accept the tax of £10 with respect to him provided by sect. 3 of the Act of 1881. But the appellant was under no legal obligation to accept that amount; and, unless it were accepted, the respondent had no legal right, having regard to the local Acts in force, to land. The appellant acted under instructions from the commissioner of customs, and Her Majesty's responsible minister ratified what was done as an act of State policy, and on that ground no action lay. Further, the master of the ship was guilty of misdemeanour, and subject to a penalty for bringing into port more immigrants than by law he was entitled; and that again justified the refusal to accept £10 in respect of any one of the men so brought.

On the broad constitutional ground, it was contended that Her Majesty by her prerogative had power to prevent any alien from landing in any part of her dominions. The Colonial Government and the Queen's ministers for Victoria, representing and acting on behalf of Her Majesty, were entitled, in exercise of that prerogative, to prevent an alien from landing in any part of Victoria.



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It was the duty of the Municipal Court, in an action by an alien, to presume that such act of the local Government [275] was done by Her Majesty's command, as she had not in any manner disallowed such act. Under the constitution granted to the colony (see the Constitution Act, 18 & 19 Vict., c. 55, schedule), the Government must be deemed to have been invested with power to preserve peace, order and good government, and generally with functions as regards the colony co-extensive with those of the Imperial Government as regards Great Britain. So far as the exclusion of Chinese from the colony was a local matter, the local minister would advise the exercise of prerogative; if it became a matter of imperial concern the case would be altered. In this case it was only a matter of local concern, and the Chief Justice was right in construing the Acts of Parliament which conferred the Victorian constitution to mean that they gave to the local minister the power of advising the exercise of prerogative with respect to it. With regard to the mode in which it had been exercised in this case, it was in no way inconsistent with any of the Chinese Immigrant Acts, the effect of which was that it was unlawful for the master of this ship to permit any Chinese immigrant to land, and also unlawful for any such immigrant to enter the colony, notwithstanding the tender of £10. A right to deport aliens is not claimed in this case; it is a right to exclude them which is now in question. Reference was made to *The Rolla* (1); *Buron v. Denman* (2), as to the act complained of being an act of State, for which no action lies. As to the Crown's prerogative to prevent the entry of aliens, see Kent's Commentaries, vol. i., p. 37; Phillimore's International Law, vol. iv., pp. 2 and 219; Blackstone's Commentaries, vol. i., p. 338, et seq.; Chitty on Prerogative, p. 49; Hansard, vol. xxxiv., p. 1065, per Lord Eldon, p. 1069, per Lord Ellenborough. Reference was also

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(1) 6 Rob. Adm., 364.

(2) 2 Ex., 167.

made to the Alien Acts (33 Geo. 3, c. 4, s. 7; 56 Geo. 3, c. 86).

Sir *W. Phillimore*, Q.C., and *J. W. McCarthy*, for the respondent, contended that the act of the appellant, as collector of customs, was not an act of State, and that there was no power to prevent the respondent from landing in the colony of Victoria, and no power to detain him in the manner complained of. Even if there were such [276] power, it did not reside in those officials under whose approval the appellant justified. It was conceded on behalf of the respondent—(a) that every state may by international law exclude aliens; (b) the Victorian Parliament may pass any Act for excluding aliens which the Queen does not disallow; (c) the governor may exercise, on the advice of his ministers, such prerogatives of the Crown as pass to him; (d) the ministers, as statutory officers, may exercise any power conferred by statute, local or imperial. But these points were contended for—(a) that the Crown had no prerogative right to exclude aliens by constitutional law; (b) if it has such prerogative, it has not been delegated to the colonial governor: see *Cameron v. Kyte* (1); (c) the act done in this case was neither commanded nor ratified by the Governor or Queen, and therefore was not an act of State; (d) an alien friend may bring an action in any case in which a subject can (The Lord Chancellor:—I shall certainly require authority for that proposition), and may complain of any act of a government officer not being an act of war; (e) the respondent was not excluded by the Chinese Immigrant Acts, and there was a duty on the collector towards him to accept the £10 when tendered or permit him to land.

It was further contended that the detention on board ship gave a cause of action, and also the refusal to accept the £10. The plea of the appellant was bad. It ought

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(1) 3 Knapp, 332.



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to have averred that the permissible number of fourteen Chinamen had landed, and that the appellant, as fifteenth or some other number, was attempting unlawfully so to do. Further, though there were more men on board than the master could lawfully bring into port it did not follow that they were immigrants unless it was shewn that they had come with the intention of landing.

With regard to alien friends, it was contended that they had as much right to land in, reside in, and leave the country, as an English subject had. That matter had been debated in Parliament; on one side were Lord Eldon and Lord Ellenborough (Hansard, vol. xxxiv., cols. 1065 and 1069), and on the other Sir Samuel Romilly (Hansard, vol. xxxiv. p. 445), Sir J. Mackin-[277] tosh (p. 467), Mr. Denman (Hansard, vol. vii. (N.S.) p 1723), and for Mr. Hobhouse's opinion see Hansard, vol. vii. (N.S.) p. 1434. The two first named said that the Crown had the right to deport: see *Calvin's Case* (1). It is never possible by prerogative, and apart from statute, to prohibit landing or to send away. Reference was made to *Routledge v. Low* (2), where it was said that an alien friend may hold all kinds of property and bring all kinds of actions, even though resident abroad: see Bacon's Abridgment, tit. Aliens, p. 180. Could a man with these rights be prevented by prerogative from landing? See *In re Adam* (3): Sir J. Arnold's Life of Lord Denman, vol. i. p. 220; Memoirs of Sir S. Romilly, vol. iii., p. 258; Blackstone, vol. i., p. 338; Chitty's Prerogative, vol. i., p. 48. The respondent's right to land vested in him as soon as he was on board a British ship within British waters, by the constitution of this country, there being no Act of Parliament to prevent it, and a long consent in favour of it. (LORD HERSCHELL:—but by international law this country has a right to keep the alien

(1) 7th Co. Rep. pp. 5, 6,  
 15 b., 16.

(2) L. R. 3 H. L. 100, 119.

(3) 1 Moo. P.C. 460.

out.) For the extent to which the rights of aliens are affected by Acts and proclamations, see 33 Geo. 3, c. 4, s. 7; Proclamation in London Gazette, the 23rd of March, 1796 (p. 301); 27 Edw. 3, stat. 2, c. 2; 1 Rich. 3, c. 9, s. 9; *King v. Symons* (1); Forsyth's cases of Const. Law, pp. 35, 181, 369; Phill. Int. Law, vol. iv., pp. 2 and 3; *Cameron v. Kyte* (2); *Musgrave v. Pulido* (3); Stephen's Hist. Criminal Law, vol. ii., p. 61, as to act of State. *Conway v. Gray* (4); *Barry v. Arnaud* (5), as to collector not accepting the £10.

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Even assuming the existence of the prerogative, could it be exercised by the colonial governor or his ministers. For a great many purposes the colonial ministers were ministers of the Queen, but not for all; never where the British ministers would be entitled to advise the Crown. The act of the governor must be shewn to be within the terms of his commission, which was necessarily restricted, and the ministers of the governor could not be in a better position than himself.

[278] *Wrixon*, Q.C., in reply :—

He submitted that the construction of the Constitution Act adopted by the Chief Justice was right, and that the majority of the Court was wrong. By that Act a system of government was established in the colony which carried with it the right and duty on the part of the executive to do all acts that might be necessary or expedient for the security, safety and welfare of the colony. It could not be, as contended by one of the judges, that the colony was without the legal means of preventing the refuse of alien nationalities from landing on its territory whenever they pleased. It was admitted on the pleas that the act complained of was done by the Queen's Government. It was, therefore, not open to a foreigner to complain of that act in a municipal Court.

(1) 2 Strange's Notes of Cases (Madras), p. 93.

(2) 3 Knapp, 332.

(3) 5 App. Cas. 102, 109.

(4) 10 East, 536.

(5) 10 A. & E. 646.



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As to the prerogative right to exclude, there was, no doubt, a conflict of authorities. Possibly the authorities cited were dealing with the case of aliens who had already entered the country, and had acquired a certain claim to protection. Where an alien was amongst us, and had acquired a certain status, there was no prerogative to turn him out. This was a case where the law distinctly said he was not to land. Under the Constitution Act, powers of legislation were given, and an executive appointed, to carry out the law. Necessary prerogative for local purposes was given to the local Government. The act complained of was an act of State not to be questioned in Court, which should have inferred a ratification by Her Majesty.

The judgment of their Lordships was delivered by

THE LORD CHANCELLOR:—

This is an appeal from a judgment of the Supreme Court of Victoria in favour of the respondent, a Chinese immigrant, the plaintiff in an action against the collector of customs at Victoria, who was the defendant in the action, and is now the appellant.

By an order made in the action by consent, the action was to be determined by the decision of the full Court on the argument of the questions of law raised in the pleadings.

The question having been argued, the majority of the Court gave judgment in favour of the plaintiff.

[279] By a further proceeding in the action the damages were assessed at £150, and from that judgment the present appeal was brought.

It is necessary first to ascertain what question is raised by the pleadings, and upon what state of admitted facts the question so raised is to be determined.

The statement of claim sets out that the defendant was the collector of customs within the meaning of the

Chinese Act, 1881, alleges the arrival in Hobson's Bay of the plaintiff on board a British ship, *Afghan*; and in the fourth paragraph, that the master of the ship *Afghan* "offered to pay, and was always ready and willing to pay, to the defendant, as such collector of customs as aforesaid, in respect of the plaintiff, the sum of £10 as provided in sect. 3 of the Chinese Act, 1881. Yet the defendant refused to allow the plaintiff to land in Victoria, and hindered and prevented the plaintiff from landing in Victoria and altogether refused and declined to receive the said sum of £10."

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The allegation of the tender of the £10 is somewhat ambiguously worded. It may mean that £10 was tendered separately for the plaintiff, which would seem to be its natural meaning, or it may mean that a gross sum was tendered for all the immigrants on board, including, therefore, the £10 for the plaintiff, but it can make no difference, for reasons to be presently stated, in which sense the allegation is to be understood.

With respect to the concluding allegation that the defendant hindered and prevented the plaintiff from landing, it seems to imply a duty in the collector of customs to receive the £10 under the circumstances stated and described, and to allege as one of the consequences of a breach of that duty, that the plaintiff was thereby prevented and hindered from landing. It certainly does not seem to suggest any other hindering and preventing than that which was involved in the refusal to receive the £10.

The statement of defence was what would have been described under a former system of pleading as a plea in confession and avoidance. And the demurrer admits every material allegation which is necessary for the determination of either of the separate defences which the statement of defence sets up. It states that the plaintiff was [280] a subject of the Emperor of China, and owed



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allegiance to him, and was not a British subject, and that whilst the Acts of the Parliament of Victoria mentioned in the statement of claim were in full force and unrepealed, the plaintiff was a Chinese immigrant within the meaning of the said statutes, and as such immigrant had arrived at the port of Melbourne, in a certain vessel called the *Afghan*, which vessel had so arrived in the port with 268 Chinese immigrants on board, being 254 more Chinese immigrants than under the statute such vessel might lawfully bring into the port of Melbourne. The record, therefore, discloses these facts—that the plaintiff was an alien Chinese; that he had arrived on board a vessel conveying immigrants exceeding the number which could be lawfully brought into port by that vessel; that the sum of £10 had not been paid to the collector of customs in respect of the plaintiff; and that the master of the vessel had offered to pay, and was always ready and willing to pay that sum. The question is whether, upon these facts, the plaintiff has shewn that there was a breach of duty towards him committed by the defendant, and that a legal right which he possessed has been infringed. Their Lordships will in the first instance consider the questions which have been raised with regard to the construction of the Code of Victorian Statutes, and their bearing upon the present case, although there is a broader question opened by the claim of the plaintiff, to which allusion will be made hereafter. It is not open to controversy that, by virtue of the third section of the Chinese Act of 1881, the plaintiff had no legal right to land until the sum of £10 had been paid for him, and the non-payment of that sum would prima facie be a complete answer to the complaint that he had been hindered and prevented from landing. The plaintiff seeks to get rid of this difficulty by the allegation that he, or the master of the vessel on

his behalf, tendered and was ready and willing to pay the £10, and that it was by the refusal of the defendant to receive it that the payment provided for by the statute was not made. But it is obvious that this will not aid him, unless he can establish that there was a legal obligation on the part of the collector to receive the sum, and that as the refusal to receive it constituted a [281] breach of duty towards him, his right to maintain the action was thus made good. It appears to have been contended that the true construction of the third section of the Chinese Act, 1881, was that a license to land was intended to be given to any Chinese immigrant, provided that he paid £10 on landing. Their Lordships are wholly unable to concur in any such interpretation of the Code of Statutes regulating the admission of Chinese immigrants into the colony. On the contrary, the manifest object of the code was to prevent an excessive number of Chinese, or what the legislature thought to be an excessive number of Chinese, landing in the colony, and not merely to impose a tax on those who were desirous of entering it. Their Lordships think that a consideration of the several provisions of the Act of 1881, read as they must be together, renders it clear that this was so. The second section of the Act provides that the owner, master, or charterer of a vessel arriving with a greater number of immigrants than is allowed shall be liable on conviction to a penalty of £100 for each immigrant so carried in excess of the number permitted. The object of this legislation is obvious. It was to prevent the introduction into the colony by means of one vessel of more than the limited number permitted, and not to license it on payment of a penalty. It is not because the unlawfulness of an act is visited by a pecuniary penalty that the payment of that penalty makes it lawful.

The third section of the Act was part of the same

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scheme, and evidently designed with the same view as the second section. It not merely prohibits any Chinese immigrant landing until the sum of £10 has been paid in respect of him, but it enacts that before making any entry at the customs the master of the vessel by which the immigrant arrives shall pay to the collector of customs the sum of £10 "for every such immigrant," and that no entry is to be deemed to have any legal effect until such payment has been made. It is clear, in their Lordships' opinion that where the master of a vessel has committed an offence by bringing a greater number of Chinese into a port of the colony than the statute allows, he can have no right to require the collector of customs to receive payment in respect of such immigrants, and thus to further [282] the purpose for which the unlawful act was committed, and that there can be no legal duty on the part of the collector to receive any payment tendered him in respect of such immigrants. If this be so, the case of the plaintiff manifestly fails, for, as has been pointed out, the statute prohibits his landing before the payment of the specified sum, and he could only get rid of this difficulty by shewing that the refusal to receive payment was unlawful. It was urged on behalf of the plaintiff that the payment of £10 provided for is made in each case on behalf of the immigrant, and that whatever may be the position of a master who has brought himself within the penal provisions of the second section of the statute, each immigrant is entitled to require that the collector shall receive the payment made by or for him. Their Lordships are unable to adopt this construction of the statute, or to hold that its effect is to confer any such right as that suggested, where the act of bringing the intending immigrants into port by the vessel is a contravention of the law.

Their Lordships have so far dealt with the case, having

in view only the enactments of the legislature of Victoria, and it appears to them manifest that upon the true construction of these enactments no cause of action is disclosed on the record. This is sufficient to determine the appeal against the plaintiff, but their Lordships would observe that the facts appearing on the record raise, quite apart from the statutes referred to, a grave question as to the plaintiff's right to maintain the action. He can only do so if he can establish that an alien has a legal right, enforceable by action, to enter British territory. No authority exists for the proposition that an alien has any such right. Circumstances may occur in which the refusal to permit an alien to land might be such an interference with international comity as would properly give rise to diplomatic remonstrance from the country of which he was a native, but it is quite another thing to assert that an alien excluded from any part of Her Majesty's dominions by the executive government there, can maintain an action in a British Court, and raise such questions as were argued before their Lordships on the present appeal—whether the proper officer for giving or refusing access to the country has been duly authorized by his [283] own colonial government, whether the colonial government has received sufficient delegated authority from the Crown to exercise the authority which the Crown had a right to exercise through the colonial government if properly communicated to it, and whether the Crown has the right without parliamentary authority to exclude an alien. Their Lordships cannot assent to the proposition that an alien refused permission to enter British territory can, in an action in a British Court, compel the decision of such matters as these, involving delicate and difficult constitutional questions affecting the respective rights of the Crown and Parliament, and the relations of this country to her self-governing colonies. When once

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it is admitted that there is no absolute and unqualified right of action on behalf of an alien refused admission to British territory their Lordships are of opinion that it would be impossible upon the facts which the demurrer admits for an alien to maintain an action. Their Lordships, therefore, do not think it would be right on the present appeal to express any opinion upon the question which was elaborately discussed in the very learned judgments delivered in the Court below—viz., what rights the executive government of Victoria has, under the constitution conferred upon it, derived from the Crown. It involves important considerations and points of nicety which could only be properly discussed when the several interests concerned were represented, and which may never become of practical importance, and their Lordships feel bound, upon the grounds which they have indicated, to abstain from pronouncing upon them on the present occasion. For the reasons which have been submitted, and which are indeed involved in the very able judgment of Mr. Justice Kerferd, with which their Lordships gather that the Chief Justice concurred, their Lordships will humbly recommend Her Majesty that the judgment of the Court below be reversed, and judgment entered for the defendant in the terms of the consent order. There will be no costs of this appeal.

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JUDGMENTS IN THE SUPREME COURT OF VICTORIA.

[*Reported 14 Vict. Law Rep. 349.*]

HIGINBOTHAM, C. J. :—

A judge's order was made, by consent of the parties, that this action should be determined by the decision of the full court on the argument of the questions of law raised on

the pleadings, subject to the right of either party to appeal from the decision of this court to Her Majesty in Council. The plaintiff is a subject of the Emperor of China, and not a British subject. He arrived in the port of Melbourne, in the British ship *Afghan*, on 27th April, 1888, and he was then an immigrant arriving from ports beyond Victoria within the meaning of the Chinese Immigrants Statute, 1865, and the Chinese Act, 1881. The *Afghan* carried 268 Chinese immigrants, including the plaintiff, being 254 more Chinese immigrants than she could lawfully, under the said statutes, bring into the port of Melbourne. The defendant is the collector of customs within the meaning of the last mentioned Act. Previously to the arrival of the ship he had received instructions from the commissioner of trade and customs, as and being the responsible Minister of the Crown for Victoria, charged and entrusted with the administration of the laws of Victoria relating to the customs and immigration, that there was an apprehension on the part of Her Majesty's government for Victoria that a large influx of Chinese into the colony was imminent, and that, in the opinion of the minister and of the government, such influx would be a danger and menace to the colony and to the public peace thereof, and to Her Majesty's subjects residing therein, and would be in a high degree detrimental to their interests, and that, in the opinion of the minister and of Her Majesty's government, it was for the advantage of Her Majesty's subjects residing in Victoria that such influx should be prevented, and no further Chinese, other than such as were British subjects, should be allowed to enter Victoria, and that the minister and Her Majesty's government had determined to refuse to permit any Chinese, other than such as were British subjects, to land or enter the colony. The plaintiff complained that, although the master of the *Afghan* was ready and willing to pay to the defendant, as such collector of customs, in respect of the plaintiff, the sum of 10*l.*, as provided in section 3 of the Chinese Act, 1881, the defendant refused to allow the plaintiff to land in Victoria, and hindered and prevented the plaintiff from landing in Victoria, and refused to receive the said sum of 10*l.* The defendant admits the acts charged. He asserts that the instruction, opinion and determination of the minister and of the government had been previously communicated to him by them, that the several acts complained of were done by him in obedience to such instruction and determination as such officer of Her Majesty's customs by command of our Lady the Queen, that he subsequently reported his acts to Her Majesty's said responsible

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minister, and that they were by him, and by Her Majesty's said government, ratified and approved as being acts of state.

Upon these facts of the case disclosed in the pleadings, and which are to be taken as admitted only as far as is necessary for the argument and determination of the questions of law raised by the pleadings, two grounds of defence, distinct and distinguishable from each other, have been relied on by the defendant. Before proceeding to consider the questions of law connected with these grounds, it will be convenient to notice an objection taken for the [373] plaintiff at the outset of the argument. The defence on legal grounds to the action, in both its aspects, rests partly on the material allegation that the acts complained of were done in disobedience to the instructions of Her Majesty's Victorian government. But the pleadings are silent about any advice given by Her Majesty's government to, or commands given to them by, the Governor of Victoria. And it has been argued that it is consistent with the allegations in the pleadings that the Governor was never advised in this matter by ministers, and did not at any time authorize or ratify their act. The Attorney-General, in the course of a luminous and powerful argument, contended that, under the constitutional system of Victoria, the prerogatives and powers of the Crown of England might be considered indifferently to be vested either in the Governor, as the representative of the Crown, or in the members of Her Majesty's government for Victoria. If the latter hypothesis be accepted, the omission from the pleadings of a statement that advice had been given to the Governor would be of course unimportant. Upon the same hypothesis, indeed, the office itself of the Governor would appear to be superfluous for the purposes of government. But this view seems to me to involve a total departure from the analogy of the English form of government, and to be wholly opposed to the express provisions of Victorian law. In England all the prerogatives and powers of government are lodged absolutely in the Sovereign. The Sovereign's responsible advisers have no legal powers of government whatever vested in them. They have the right to advise the Sovereign, and it is their duty to obey, and to carry into executive act, the commands of the Sovereign founded upon such advice. The Constitution Act, following the English exemplar, creates and vests in the Governor certain powers, but none in his advisers. The Governor is appointed by the Sovereign, and he derives his constitutional powers from the Constitution Act, to which the Sovereign has assented.

He is therefore properly styled and regarded as the representative of the Crown in his character as the depository of his statutory powers. Victorian Ministers are appointed by the Governor. They have no legal powers of government whatever vested in them by the Constitution Act. They have the right to exercise the function of advising the Governor, as the representative of the Sovereign, in the exercise of his statutory powers, and it is their duty to obey; and to carry out into executive act, the commands of the Governor founded upon such advice. They are styled in these pleadings "Her Majesty's Government" for Victoria, and I think they are properly so styled. They are paid salaries out of Her Majesty's Victorian civil list, and although they do not tender advice to, or receive commands from, Her Majesty in person or directly, it is they, and they alone, who advise and act for the representative of the Crown in this dependency of the Crown, and their executive acts, which it is within the powers of the Governor to command to be done, may properly be said to be commanded by Her Majesty as being the highest and ultimate source of all executive authority throughout the Queen's dominions. In this view of the legal relations existing between the Sovereign and her representative in Victoria and Her Majesty's responsible ministers for Victoria, the difficulty that appeared to embarrass the argument will be found to disappear. Her Majesty's government for Victoria are responsible to the Parliament of Victoria for the acts of the representative of the Crown in Victoria. The nature of the advice given by them to the representative of the Crown is to be inferred from those acts. The advice actually given is not announced except by the command, or with the consent, of the representative of the Crown. The minister is privileged with respect to the advice given by him, and he cannot be compelled in a court of law to disclose it. The defendant's pleader appears to have exercised a wise discretion in not alleging the authority of the Governor for the acts of Her Majesty's Government. That authority will be presumed to have been given, and the allegation, if it were made, need not be proved: *Buron v. Denman* (1). If the allegation were made and could be traversed, the defendant might not be able to adduce evidence in proof of it. If no advice was in fact given in this case to the Governor, or if the acts done by the Victorian Government have not been in fact authorized or ratified by him, Her Majesty's representative is not without a constitutional remedy. But an act done by the responsible ministers for Victoria, in the ostensible dis-

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(1) 2 Ex. 169, 190.



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charge and within the apparent limits of their functions as ministers, may be considered for all purposes, so long as ministers are [375] allowed to hold their offices, as the act of the Crown in Victoria, and it is properly described as having been done by the command of Her Majesty.

The first defence is in the nature of a dilatory plea, and in effect denies the jurisdiction of this Court to entertain the action. The second defence claims to prevent an answer to the action on the merits. The first of these defences, which denies the jurisdiction of the Court, is founded upon the view that the act of the defendant, having been ratified and adopted by Her Majesty's government for Victoria, is an act of state, and is consequently not cognizable by the municipal courts of Victoria. "The general principle of law was not, as indeed it could not, with any colour of reason, be disputed. The transactions of independent States between each other are governed by other laws than those which municipal Courts administer; such Courts have neither the means of deciding what is right, nor the power of enforcing any decision that they may make:" *Secretary of State in Council of India v. Kamachee Boye Sahaba* (1) This defence admits that the original acts of the defendant in refusing to allow the plaintiff to land in Victoria, and in preventing him from landing in Victoria, were wrongful acts, and furnish a cause of action on a wrong to the plaintiff. It asserts that such acts were by the responsible minister and by Her Majesty's government of Victoria ratified and approved of as being acts of state. The act of adoption must be the act of the sovereign power of the State which adopts the act of the alleged wrongdoer, or, which is the same thing, it must be the act of a person authorized by the sovereign power as its agent or trustee to bind the adopting State. The act of state, in the sense in which the terms are used in the present case, may be considered to be either a challenge to war or an invitation to treat. The wrong complained of must, if reparation for it cannot be obtained in a municipal court, be the subject of a claim for compensation or redress against the Sovereign of the State of which the alleged wrongdoer is a subject. The Sovereign of that State, having adopted the act, must be prepared either to allow the claim or to disallow it, and, if he disallow it, to support his disallowance by war, or any other means at the command of the head of an independent State. A private dispute between the subjects of two countries may, in such

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(1) 13 Moo. P. C., 22, 75.

[376] a case, thus lead to war. The authorities which have been cited on this point, shew that no power short of that of the Sovereign, or of the agent or trustee authorized for that purpose by the Sovereign, can adopt an act done by a subject of the Sovereign to an alien so as to make that act an act of state, and thereby oust the jurisdiction of the municipal Courts. In *Buron v. Denman* (1) the acts of the defendant in concluding a treaty with the King of the Gallias, and firing the barracoons of the plaintiff, and carrying away the plaintiff's slaves, were ratified by the Secretaries of State of the foreign and colonial departments of the Imperial Government. It was held that such ratification rendered the defendant's acts an act of state or an act of the Queen, for which the defendant was irresponsible. In the case of the *Secretary of State in Council of India v. Kamachee Boye Sahaba*, (2) it appeared that the East India Company, which was empowered under certain restrictions to act as a Sovereign State in transactions with other Sovereign States in India, had by its agent, seized the property the subject of the suit. It was held that the seizure was an act of arbitrary power on behalf of the Crown of Great Britain by the East India Company, as trustee for the Crown of the dominion and property of a neighboring State an act not affecting to justify itself on grounds of municipal law, and that the act so done, with its consequences, was an act of state, over which the Supreme Court of Madras had no jurisdiction. Is the allegation in the present case that the responsible minister and Her Majesty's government for Victoria have ratified and approved of the acts of the defendant in preventing the plaintiff from landing in Victoria, equivalent to an allegation that Her Majesty had ratified those acts? Has Her Majesty's government for Victoria the power to advise the Crown, through its representative in Victoria, upon a question of this kind, so as to make that an act of state, which, without Her Majesty's sanction and authority, express or implied, would not be an act of state? I am of opinion, that these questions must be answered in the negative. Victoria, like the other self-governing British colonies, is a dependency of Great Britain. It possesses by statute law very large and, in my opinion, almost plenary powers of internal self-government. But all the prerogatives and powers of the Sovereign [377] are not vested by law in the Queen's representative in Victoria. Nor can all of them be the subject of advice to the Governor by the Queen's ministers for Victoria. The prerogatives of war and

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(1) 2 Ex., 167.

(2) 13 Moo. P. C., 22.



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peace, of negotiation and treaty, together with the power of entering into relations of diplomacy or trade, and holding communication with other independent States, to some one or all of which the power to do an act which shall constitute an act of state appears to be annexed, have not been vested in the Governor of Victoria by law express or implied, and it is not suggested on these pleadings, that all or any of these prerogatives and powers have been superadded, by Royal Commission or otherwise, to those conferred on the Governor by statute law, so as to make the Governor of Victoria the trustee or agent of the Crown, in the adoption of the act of an individual, and thus make the act, the act of the Sovereign or an act of state. Even if such powers had been so superadded, they would be exercisable by the Governor only, as an agent or trustee of the Crown, and would not be the subject of responsible advice. The ministers of the Crown for Victoria have not obtained the direct sanction of Her Majesty, and they could not by their own act in a matter of this kind bind the Crown. An English minister could do so, because he acts for the Crown in respect of all its prerogatives and powers. A minister of the Crown for Victoria cannot do so, because he acts for the Crown in respect of such powers only as are vested by law in the Governor, of which the power to do an act of state does not appear to be one. We are of opinion, for these reasons, that the act of the defendant has not been made an act of state, and that the jurisdiction of the Court to entertain the plaintiff's claim, is not ousted.

The second line of defence is of a different kind. It has been contended for the defendant, that his act in preventing the plaintiff from landing in Victoria was not only an act authorized and directed by the responsible minister of his department, and afterwards adopted by Her Majesty's government for Victoria, but that the act of the defendant was authorized by law as being an act done in exercise of an existing power or prerogative of the Crown of England, to keep out or expel aliens at its discretion, and that this power or prerogative, or a power equivalent to it, had, so far as it may be exercised for the safety and protection of the people of Victoria, passed by law to and had been vested in the representative of the Crown for Victoria. If this view be sustained, the facts stated raise, not a dilatory plea, but a plea in bar, and are a defence to the action.

The plaintiff has failed, in my opinion, to answer the authorities relied on by the defendant to shew that the right to prevent aliens from landing on British soil, and to remove them after they have landed, is an existing prerogative of the Sovereign of England.

The great preponderance of authorities, both ancient and in recent times, is in favour of the defendant's view upon this question. The right is one that appears to be necessarily inherent in the sovereign power of every civilized society occupying a territory with defined limits. It is a right not unfrequently put in force at this day in several of the States of Europe. Its exercise may be irritating to individuals who are affected by it, and may weaken the comity between States, but it is not deemed by international law to be a cause of war or a ground of claim for compensation. The right and the duty of guarding it are recognised in the kindred institutions of the United States of America.

"If however any government deems the introduction of foreigners or their merchandise injurious to those interests of their own people which they are bound to protect and promote, they are at liberty to withhold the indulgence. The entry of foreigners and their effects is not an absolute right, but only one of imperfect obligation, and it is subject to the discretion of the government which tolerates it. . . . I am of opinion . . . that every government has the right, and is bound in duty, to judge for itself how far the unlimited power of emigration and of the admission and residence of strangers and emigrants may be consistent with its own local interests, institutions, and safety." (1)

This right or prerogative has been undoubtedly exercised by the Sovereign of England, and its non-user in modern times in England is no evidence that the right itself has become extinct. Its continued existence on the other hand within the present century has been asserted by some of the most eminent English Judges. The passing of the Alien Acts affords no argument against the prerogative. These Acts appear to have been enacted mainly for the purpose of improving and enlarging the means of carrying out more effectually the purpose of the prerogative. An argument [379] against the use of this prerogative might, perhaps, be found in the fact that England, and also America, have in our own times, in effect, denied to China, the same right to exclude foreigners from its territory which the English Crown and the American Republic claim for themselves. But the doctrine of English and American law as to the existence of the right cannot be affected by the injustice or inconsistency of the English and American Governments in practically withholding from another country the recognition of a right which they claimed for themselves.

Except for the purpose of ascertaining the nature and high authority of this prerogative, and that it is one that is essential to

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(1) Kent's Comm. vol. 1, p. 35, Text Book Series.



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the security and well being of every human society, it is unnecessary, however, to consider whether the right to exclude aliens is, or is not, a continuing prerogative of the Crown of England. The question we have to determine in the present case is whether a power equivalent to this prerogative has, or has not, been vested by law in the representative of the Crown in Victoria, and can be exercised by the representative of the Crown upon the advice of his responsible ministers.

This part of the argument raises, for the first time in this Court, constitutional questions of supreme importance. We are called upon, for the purpose of adjudicating upon the rights of the parties in this case, to ascertain and determine what is the origin and source of the constitutional rights of self-government belonging by law to the people of Victoria, and, if such rights exist, what is the extent, and what are the limits, assigned to them by law.

Imperial statute law is admittedly one source of the public as distinguished from individual rights of every dependency of the British Crown possessing powers of internal self-government. I think it must be added that such public rights have no other source. Our attention has been called in the argument to the commission and instructions issued by the Crown to successive Governors in Victoria, and it has been suggested that the alleged defective powers conferred on the Governor by the Constitution Act have been supplemented by additional powers contained in those instruments. In my opinion this suggestion cannot be entertained in a court of law which is called upon to deal with and determine a question of constitutional law. The commission and instructions [380] to the Governor are issued by Her Majesty upon the advice of Her Majesty's Imperial ministers. The powers and commands contained in them are always revocable by the Sovereign. Before the Constitution Statute those instruments constituted almost the only source of the authority of government in Victoria. The Governor was then a mere agent of the Crown and the officer on foreign service of the department of the Secretary of State for the Colonies.

As such agent and officer, it was the Governor's single duty to exercise the powers from time to time given to him by the Crown, together with the few powers conferred on him by the Act 13 & 14 Vict., c. 59, in conformity with and subject to the orders from time to time communicated to him by the Secretary of State. Since the Constitution Statute the Governor retains, for many purposes, the same legal character of an Imperial agent or officer, and is subject to similar orders. He is paid a salary out of Her Majesty's

Victorian civil list, and his services can be lawfully commanded by the Crown in matters affecting Imperial interests. The relations during peace or in time of war of foreign or independent States to Great Britain, so far as that may be affected by the indirect relations of such States to this dependency of Great Britain, the treatment of belligerent and neutral ships in Victorian waters in time of war, the control of Her Majesty's military and naval forces within Victoria, the reservation of or assent to Bills passed by the Legislature of Victoria (a subject expressly excepted by the Constitution Statute from the operation of Victorian constitutional law), these and a variety of other questions by which Imperial interests may be affected, and with regard to which Victorian constitutional law does not prohibit interference by the Imperial Government, still form subjects upon which commands may be lawfully issued to the Governor by the Imperial authorities. With reference to all such questions, the Governor is to fulfil his instructions without being controlled, and without a legal right to be assisted, by the advice of Her Majesty's ministers for Victoria. The expenses that may be incurred by the Governor in his character as an Imperial agent would, in strictness, be chargeable upon the Imperial, and not upon the Victorian revenues. All such lawful instructions by the Crown to its agent are outside the sphere of the Victorian constitution, and do not form a part of the public law of Victoria. [381] By the Constitution Act certain powers are granted to and vested in the Governor as the appointee or representative of the Crown and the head of the executive government in Victoria. These powers constitute the sole basis of constitutional government in this colony, and in all other self-governing dependencies of Great Britain. They are not conferred by the Crown alone, but by an Act of the Victorian Legislature, which the Imperial Legislature authorized the Crown to assent to. They cannot be taken away by the Sovereign. The exercise of them in accordance with the Constitution Act cannot lawfully be interfered with either by Her Majesty or Her Majesty's Imperial advisers. They cannot be regranted by Her Majesty so as to make them dependent on or revocable at the will of the Crown. The Governor, in the exercise of those powers in and for Victoria, is not an agent of the Crown nor an officer of the Secretary of State for the Colonies. A new and a distinct authority is conferred upon him by law on his appointment, he is created, for all purposes within the scope of the Act of the Victorian Legislature, the local Sovereign of Victoria. This dual character of the Governor is not recognised in the Royal

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Commission and instructions which have been brought before us, nor in the letters patent which, since 21st February, 1879, have purported to make permanent provision for the office of Governor and Commander-in-Chief in Victoria. All these instruments have been stated to be the same in substance as the commission and instructions which were formerly issued by the Crown to the Governor of New South Wales, and to the Governor of Victoria after separation from New South Wales and before the Constitution Act came into operation. The provisions contained in them would be legal, and might be proper if they were communicated to a Governor who was only an agent of the Crown. Some of those provisions are now, in my opinion, void, as the powers they purport to convey have been already expressly or impliedly granted by statute law. Others are, in my opinion, illegal, as they are addressed to the Governor of a self-governing colony, and purport to give him instructions with reference to the exercise of powers which are vested in him by statute law, and which it is his duty to exercise only in the mode provided by that law. The following are instances occurring in these instruments of grants [382] that appear to be void:—(1.) The power to constitute and appoint Judges and other officers. (1) This power has been granted to the Governor in Council by sect. 37 of the Constitution Act. (2.) The power to convene and prorogue Parliament and to dissolve the Legislative Assembly. (2) This power has been granted to the Governor by sect. 28 of the Constitution Act. (3.) The power to grant a pardon to an offender, free or conditional. (3) The power

(1) Letters Patent, dated 21st February, 1879.

“VIII. The Governor may constitute and appoint, in Our name and on Our behalf, all such Judges, Commissioners, Justices of the Peace, and other necessary officers and Ministers of the Colony as may be lawfully constituted or appointed by Us.”

(2) Letters Patent, dated 21st February, 1879.

“XI. The Governor may exercise all powers lawfully belonging to Us in respect of the summoning, proroguing, or dissolving any legislative body which now is or hereafter may be established within Our said colony.”

(3) Letters Patent, dated 21st February, 1879.

“IX. When any crime has been committed within the Colony, or for which the offender may be tried therein, the Governor may, as he shall see occasion, in Our name and Our behalf, grant a pardon to any accomplice in such crime who shall give such information as shall lead to the conviction of the principal offender, or of any one of such offenders if more than one, and further may grant to every offender convicted in any Court, or before any Judge or any Magistrate within the Colony, a pardon either free or subject to lawful conditions, or any remission of the sentence passed on

of free pardon is, in my opinion, vested in the Governor by the Constitution Act, as and being a power reasonably necessary for the administration of criminal law in a self-governing community. The additional power of conditional pardon is vested in the Governor by the Criminal Law and Practice Statute, 1864, sects. 318, 319. The following are instances of commands and authorities in the Governor's commission, instructions, and letters patent which are, in my opinion, illegal, and contravene the express or the implied provisions of the statute law :—(1.) The command to do and execute all things that belong to his office according to orders and instructions given under the sign manual, or by Order in Council, or by the Secretary of State.(1) (2.) The instruction to consult [383] the Executive Council in all but excepted cases. (2)

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any such offender, or any respite of the execution of such sentence, for such period as the Governor thinks fit; and further may remit any fines, penalties, or forfeitures due or accrued to Us."

(1) Letters Patent, dated 21st February, 1879.

"II. We do hereby authorize, empower, and command Our said Governor and Commander-in-Chief (hereinafter called the Governor) to do and execute all things that belong to his said office, according to the tenor of these Our Letters Patent, and of such Commission as may be issued to him under Our Sign Manual and Signet, and according to such instructions as may from time to time be given to him under Our Sign Manual and Signet, or by Our Order in Our Privy Council, or by Us through one of Our principal Secretaries of State, and to such laws as are now or shall hereafter be in force in the Colony."

Commission, dated 10th April, 1884.

"II. And we do hereby authorize, empower, and command you to exercise and perform all and singular the powers and directions contained in Our Letters Patent,

bearing date at Westminster, the twenty-first day of February, 1879, constituting the said office of Governor and Commander-in-Chief, according to such orders and instructions as Our Governor and Commander-in-Chief hath already received, or as you may hereafter receive from Us."

(2) Instructions, dated 21st February, 1879.

"VI. In the execution of the powers and authorities granted to the Governor by Our said Letters Patent, he shall in all cases consult with the Executive Council, excepting only in cases which are of such a nature that, in his judgment, Our service would sustain material prejudice by consulting the said Council thereupon, or when the matters to be decided are too unimportant to require their advice, or too urgent to admit of their advice being given by the time within which it may be necessary for him to act in respect of any such matters. In all such urgent cases he shall, at the earliest practicable period, communicate to the said Council the measures which he may so have adopted, with the reasons thereof."



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(3.) The authority to act in opposition to the advice given to the Governor by the members of the Executive Council, if in any case he deem it right to do so, and to report thereon to the Crown (1). (4) The commands and authorities relating to the regulation of the power of pardon in capital cases (2). (5.) The in-[384]structions relating to the terms of appointment of judges, justices, and other officers (3). (6.) The command not in any case to make it a condition of pardon or remission of sentence that the offender shall absent himself or be removed from the colony (4). The power to make this a condition of pardon or remission belongs to the Governor by statute law, the Criminal Law and Practice Statute, 1864, sect. 318, and the exercise of such power, if it be advised by Her Majesty's responsible ministers for Victoria, cannot, in my

(1) Instructions, dated 21st February, 1879.

"VII. The Governor may act in the exercise of the powers and authorities granted to him by Our said Letters Patent in opposition to the advice given to him by the members of the Executive Council, if he shall in any case deem it right to do so; but in any such case he shall fully report the matter to Us, by the first convenient opportunity, with the grounds and reasons of his action."

(2) Instructions, dated 21st February, 1879.

"XI. Whenever any offender shall have been condemned to suffer death by the sentence of any Court, the Governor shall call upon the Judge who presided at the trial to make to him a written report of the case of such offender, and shall cause such report to be taken into consideration at the first meeting thereafter which may be conveniently held of the Executive Council, and he may cause the said Judge to be specially summoned to attend at such meeting, and to produce his notes thereat. The Governor shall not pardon or reprieve any such offender unless it shall appear to him expedient so to do, upon receiving

the advice of the said Executive Council thereon; but in all such cases he is to decide either to extend or withhold a pardon or reprieve, according to his own deliberate judgment, whether the members of the Executive Council concur there, in or otherwise; entering, nevertheless, on the minutes of the said Executive Council, a minute of his reasons at length, in case he should decide any such question in opposition to the judgment of the majority of the members thereof."

(3) Instructions, dated 21st February, 1879.

"XIII. All Commissions granted by the Governor to any persons to be Judges, Justices of the Peace, or other officer shall, unless otherwise provided by law, be granted during pleasure only."

(4) Letters Patent, dated 21st February, 1879:—

"IX. . . . Provided always that the Governor shall in no case, except where the offence has been of a political nature unaccompanied by any other grave crime, make it a condition of any pardon or remission of sentence that the offender shall absent himself or be removed from the Colony."

opinion, lawfully be prohibited by Her Majesty. No cause has contributed in nearly the same degree to the general imperfect understanding and the long conflict of educated opinion on the subject of the origin and source and the nature of Victorian constitutional law, and to the irregular and disturbed exercise of the functions of constitutional government in Victoria, as the constant and still continuing claim of the Imperial Government to interfere, by means of instructions, with the independence of the Queen's representative. Dishonour is done to the Crown when it is advised to make grants of powers that are void, and to issue instructions that are illegal. Grievous injustice is done to the representative of the Crown, who comes to the seat of his government misinstructed in his duties and powers, and is required to undertake obligations which he ought not, and cannot, and does not fulfil. The embarrassments and difficulties in the administration of the affairs of government that have sprung from the same cause, and the unregarded protests of one branch of the Victorian Legislature, are matters of Victorian public history affecting the whole people of which a court of law may take cognizance. (1)

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(1) An address to the Governor of Victoria, Sir Henry Manners-Sutton, was moved by Sir James McCulloch, and adopted by the Legislative Assembly on 4th June 1868, with reference to a despatch of the Duke of Buckingham, the Secretary of State for the Colonies, to the Governor, dated 1st January 1868. The following passage occurs in the address :—

“ Our attention has been directed to an official communication from the Secretary of State for the Colonies, published by your Excellency's authority, in which the Secretary of State, on the part of Her Majesty's Imperial Government, suggests or directs that your Excellency should not recommend the vote to Lady Darling to the Legislative Assembly except on a clear understanding that the grant would be brought before another branch of the Legislature in a particular form. Entertaining, as your Excellency is aware we do, feelings of profound and de-

voted loyalty to Her Majesty, and of attachment to the Queen's supremacy over this portion of her dominions, we are constrained to inform your Excellency that we regard this communication from Her Majesty's Imperial advisers as a violation of the constitutional rights of the Legislative Assembly, and as a dangerous infringement of the fundamental principles of that system of responsible government which has been secured to the people of Victoria by an Act of the Imperial Parliament. We inform your Excellency that no understanding upon this subject will be entered into with your Excellency by us or by our authority, and that we reserve for free discussion and final settlement within this Chamber the question of the form of the grant to Lady Darling, and of all our other grants to the Crown.”

The following resolution was passed by the Legislative Assembly on 22nd December 1869 (see “ Parli-



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[385] It is the duty of Victorian statesmen to protect the law of the constitution from unlawful interference. It is the duty of a Judge of this Court, in my opinion, when occasion requires, to declare that such interference is unwarranted by law, and that all instructions by Her Majesty or the Secretary of State to the Governor of Victoria not authorized by law are, even when they are not expressly forbidden by law, outside the law of the constitution, and cannot be appealed to to explain, or add to, or detract from that law, or to restrict its free operation. Putting aside all such instructions, as I conceive that we are bound for the purpose of the present inquiry to do, we are compelled to the conclusion that in the Constitution Act, as amended and limited by the Constitution Statute, and in that Act alone, we must look for the legislative grounds of the self-governing powers of this people. If those powers are not to be found there, or cannot be ascertained and defined with reasonably sufficient certainty upon view of that Act alone; I think it must be conceded that they have no existence.

[386] That some powers of self-government were intended to be created and have been created by the Constitution Act has never been questioned. That these powers, apart from the powers of legislation, have operation and effect by means of the responsibility to the Parliament of Victoria of ministers or servants of the Crown for the exercise of the powers of the Crown in Victoria, is a further proposition that has never come within the range of controversy, legal or political. What is the extent of those powers, and what are the limits assigned to them by the Constitution Act? What are the powers vested by the Constitution Act, in the representative of the Crown in Victoria for the exercise of which ministers of the Crown are responsible to the Parliament of Victoria? Are those powers, together with that responsibility, limited to some

mentary Debates," Vol. 9, pages 2670-1):—"That the official communication of advice, suggestions, or instructions by the Secretary of State for the Colonies to Her Majesty's representative in Victoria on any subject whatsoever connected with the administration of the local government, except the giving or the withholding of the Royal assent to or the reservation of Bills passed by the two Houses of the Victorian Parliament, is a practice not sanctioned by law, derogatory to the

independence of the Queen's representative, and a violation both of the principle of responsible government and of the constitutional rights of the people of this Colony." It does not appear that any notice was taken by the Imperial Government of either of these protests. The illegal claim of the Imperial Government referred to in the address has never been withdrawn. The practice condemned in the Resolution remains unaltered.

only of the acts of government necessary for the administration of law, and of the domestic affairs of the people of Victoria? Or do those powers with consequent responsibility extend to all such necessary acts of government? Has the Constitution Act created a partial system of responsible government only, or has it created a complete organic system of responsible government co-extensive as regards all the functions of administration of affairs by government, with the large powers of control and supervision which the Parliament of Victoria possesses in addition to its powers (sect. 1) "to make laws in and for Victoria in all cases whatsoever"? We have now to consider what is the true answer to give to these momentous questions. I believe that that answer may possibly depend upon the extent which may be permitted to the field of judicial vision. If we are bound to confine our inspection to the Constitution Act and the Constitution Statute alone, the answer possibly may be that the Legislature has created powers and responsibilities for their exercise in certain cases only, limited in number and so far disconnected with one another as to furnish ground for doubts whether we can safely conclude that the Legislature intended to establish in Victoria a general system of responsible government. But we are bound, in my opinion, in trying to arrive at the meaning of these Acts, and at an exact conception of their scope and objects, to consider the history and external circumstances which led to their enactment, and for that purpose to consult any authentic public or historical documents that may suggest a key to their true sense. The general rule that the parliamentary history of an enactment is not admissible to explain its meaning has been not unfrequently departed from in cases where the framer of a Bill is known to have had special qualifications for his task. And there is authority for believing that English Judges of the present day might in such a case not refrain from consulting the authorized report of a speech in Parliament, even though they should be reluctant to admit it if presented for their consideration in argument in court: see per Bramwell, L. J., in *Reg. v. Bishop of Oxford* (1). In the present case I think that, while we are bound to consult the few available public documents, and to regard the rules and practice of the Imperial Parliament so far as these have been embodied in the Constitution Act, we are not forbidden to look at the authorized and authentic reports of the words of the distinguished author of the Bill during the discussion in the Legislative Council on the second reading. And if, with the light thrown upon it from all these

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(1) 4 Q. B. D. 525, 550.



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sources, we can regard the Constitution Act from the point of view from which its framers regarded it, I believe that we shall be led to the conclusion that it was the intention of the Legislative Council to provide a complete system of responsible government in and for Victoria, and that that intention was carried into full legislative effect, with the knowledge and approval and at the instance of the Imperial Government, by the Constitution Statute passed by the Imperial Parliament.

The form of both the Constitution Statute and the Constitution Act, and the title and preamble and the subsequent provisions of the Constitution Act, present on their face peculiarities which require explanation. Without some explanation, I believe that the real and full meaning and the true intention of the Legislative Council in passing the Constitution Act cannot be surely ascertained or confidently determined. The means of satisfactory explanation are greatly deficient. The measure was one that was to have a supreme and enduring influence upon the whole future of Victoria. To adopt the words used by Mr. Robert Lowe, a competent observer in the House of Commons, it was a Bill "upon which would ultimately depend the destinies of the noblest dependency of the British Crown." But the obscure and apparently disjointed clauses of the Bill itself, pregnant though they appear to be with deep but suppressed meaning, are almost the only authoritative source from which a part, and a part only, of the general design of the framers of this, the national charter of Victoria, can be ascertained. *Incuriosi suorum* (heedless of their own labours), is a descriptive term that must be applied, not in the original reproachful sense, but in one full of regret, to the pioneers of Victorian legislation. They were so fully engaged in the great work of laying the foundations of law for a nation that had been suddenly called into existence, that they seem to have been unaware of the far reaching consequences of their chief act of legislation, and to have made no effort to commemorate it or to commend their work by any enduring record to the understanding of the people of Victoria in the future. The community at the time was apathetic, and almost wholly uninformed on all political subjects. In this place, and by the members of the profession of the law, it is not, and I hope it never will be, forgotten that the foremost long intervallo of the pioneers of Victorian legislation, foremost in capacity, in public spirit, and in unselfish devotion to exacting duties and to unremitting and stupendous labours, was he who afterwards as Chief Justice of this Court administered for twenty-nine years the general body of Victorian laws, most of which he

had himself designed, prepared, and carried into legislative effect. The fact that Mr. Stawell drafted the Constitution Bill and carried it through the Legislative Council is a fact of which I feel that I am at liberty to take cognizance, and it is a fact which imposes on me and on every judge who may with me allow himself to notice it a special duty to seek diligently until we find that of which the name of its author guarantees the existence, namely, a rational and consistent meaning and purpose in the whole and in all parts of the measure. The title of the Constitution Act is ambiguous. The "constitution" proposed to be established may mean a constitution of the Houses of Legislature, or a constitution of a system of government, or it may include both those meanings. The preamble also is obscure. It recites in terms from 13 & 14 Vict., c. 59, s. 32, the authority which gave the Legislative Council jurisdiction to pass the Act. It then proceeds to recite that it is expedient [389] to establish separate Legislative Houses," and to vest in them as well the powers and functions of the Legislative Council now subsisting" (so much had been authorized by the recited Act) "as the other and additional powers and functions herein-after mentioned." The district of Port Phillip was separated from New South Wales, and was erected into a separate colony by the recited Act 13 & 14 Vict., c. 59, which was passed on 5th August, 1850. The powers and functions of the Legislative Council created for Victoria by that Act, and of the Legislative Councils authorized by the Act to be created in Van Diemen's Land, South Australia, and Western Australia, extended to the making of laws for the peace, welfare, and good government of those colonies respectively. They did not extend to allow of interference by the Legislative Council in any manner with the sale or other appropriation of lands belonging to the Crown, or of the revenue thence arising (Sect. 14). By this Act large powers of self-government, restricted, however, by limits placed on the legislative and appropriating functions of the Legislative Council, were conferred on all those colonies. The Act itself, suggested, by the recited sect. 32, an enlargement of those powers for all the Australian Colonies, including New South Wales. The Act was regarded by the Imperial Government as only the foundation "upon which might gradually be raised a system of government, founded on the same principles as those under which the British Empire had risen to greatness and power." (1) Accordingly, communications were soon opened between the Imperial Government and the Government of New South Wales, respecting the terms upon which larger powers of self-government should be

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(1) See Despatch of Earl Grey to Sir Charles Fitzroy, dated 30th Aug., 1850.



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conceded to that and to the other Australian Colonies. The principal term claimed by New South Wales was assented to by one Secretary of State for the Colonies, and was "cordially adopted" by another Secretary of State, the successor in office of the first. It was that, in return for a civil list to be granted by the colony to Her Majesty, the administration of the waste lands of the Crown, and the entire management of all its revenues, should be surrendered to the Colonial Legislature (1). "The same concession on the same terms" was offered by the Imperial Government to Victoria "with no hesitation" (2). The offer was readily accepted by Victoria, and "the additional powers and functions" thus agreed upon were proposed to be enacted by two clauses in the Constitution Bill, corresponding with sects. 54 and 55 of the Constitution Act. By the first of these clauses it was provided that it should be lawful for the Legislature of Victoria to make laws for regulating the sale, letting, disposal, and occupation of the waste lands of the Crown within the colony, and of all mines and minerals therein. By the second clause it was provided that all the consolidated revenue arising from taxes, duties, rates, and imposts levied by virtue of an Act of the Legislature, and from the disposal of the waste lands of the Crown under any such Act made in pursuance of the authority therein contained, should be subject to be appropriated to such specific purposes as by any Act of the Legislature should be provided in that behalf. It was beyond the power of the Legislative Council to pass, or of the Queen to assent to, a Bill containing either of these clauses. This fact was known to the Legislative Council, and the Bill was admitted by Mr. Stawell, the Attorney-General, to be one beyond its power to pass (3). It was necessary that an Imperial Act should be passed repealing existing laws relating to the waste lands of the Crown before the Constitution Bill could become law. This was done, the Imperial Government having first altered some of the other provisions of the Bill relating to the reservation of and assent to bills by the Constitution Statute 18 & 19 Vict., c. 55, passed on 16th July, 1855, by which Her Majesty was enabled "to assent to the Bill as amended of the

(1) See Despatch of Sir John Packington to Sir Charles Fitzroy, dated 15th December, 1852; and Despatch of the Duke of Newcastle to Sir Charles Fitzroy, dated 18th January, 1853.

(2) See Despatch of Sir John Packington to Lieutenant Gov-

ernor La Trobe, dated 15th December, 1852.

(3) See debate in the Legislative Council on the second reading of the new Constitution Bill, by Geo. H. F. Webb, assistant shorthand writer to the Council, page 66.

Legislature of Victoria to establish a constitution in and for the Colony of Victoria." The Constitution Act, containing these new powers and functions, gave plenary powers of self-government by legislation to the two Houses of the Victorian Legislature. The increased powers of the Legislature under the Act led to and necessitated the far larger change introduced by the same Act, into the system of government in Victoria by the application to [391] the enlarged functions of government of the new principle of responsibility.

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It is due to the framers of the Constitution Act that we should remember the difficulties of the task they undertook. That task was to put into written words the unwritten law of the English constitution. The English constitution consists, as regards some of its functions that are in constant and most active operation, of practice established by long use and precedents founded on principles that are in many instances unsettled or disputed. Of the difficulty that must present itself to a draftsman's mind on the side of the law of the Legislature from this cause, the theoretical dispute still existing between the House of Commons and the House of Lords as to the right of control of taxation and finances is a striking illustration. A different and an additional difficulty would present itself in the attempt to give legal expression to the actual law of the English constitution with respect to the principles of government in England. The English constitution does not recognise an existing and by far the most powerful factor in the administration by government of national affairs. The Privy Council of Her Majesty is the only advising body of the Crown known to the law. The Prime Minister, without whose authority the Privy Council cannot in fact be convened, is not a person known to the law. The Cabinet or Acting Committee of the Privy Council of the Sovereign and the responsibility of that body to Parliament are unrecognised facts. The framers of the Constitution Act may have thought this latter difficulty quite insurmountable. They adopted the curious and very hazardous expedient of attempting to enact in a written law, by means of allusions suggesting inferences rather than by express enacting words, the provisions not only unwritten but unrecognised by English law, which regulate and determine the formation and action and the conditions of existence of government in England. Thus we find in the Constitution Act that mention is frequently made of the Executive Council, though nothing is said about its constitution. The Cabinet is not once mentioned. The words "responsible offices" occur once in a Schedule (Schedule D, Part 7). The words "responsible officers" might be detected in



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[392] the marginal notes, but we are bound on the present inquiry to bandage our eyes and not to see them. The object of establishing responsible government, which we might expect to find set forth in the preamble, is not there or anywhere stated. The nature of responsible government is nowhere described. The extent of its application is nowhere expressly declared. That it was the intention of the Legislative Council to establish by law a complete system of responsible government as an essential organic part of the self-governing scheme of the Victorian constitution is a fact about which an historic doubt cannot be entertained. Mr. Stawell, the Attorney-General and draftsman of the Bill, addressing the Legislative Council on the second reading of the Bill, said, "I take it in the present case that the main principles involved in this Bill are simply these,—two chambers both elective, and a responsible government." (1) The system itself has been in full, though obstructed, operation in Victoria for all but the third part of a century. Nevertheless, we must now give answer to the question demanded of us, and say whether that intention has been expressed in the Constitution Act, or whether the national life and history of Victoria from the first has not been based upon an illusion. In order to answer this question we must examine the terms of the Constitution Act itself. Powers and functions of various kinds are created in the Governor by fifteen sections of the Act (see sects. 6, 8, 28, 32, 34, 36, 37, 38, 48, 49, 51, 53, 57, 58, and 59). One of these powers is expressly vested in the Governor alone, namely, "the appointment of the officers liable to retire from office on political grounds" (sect. 37). The officers here mentioned are clearly responsible officers or ministers. The means by which their responsibility to Parliament is secured are provided for in sect. 18, which requires that four at least of their number shall be members of the Council or Assembly. The officers filling the same offices after the coming of the Act into operation, or whose offices may be abolished under the power given to the Governor in sect. 48, are described in Schedule D, Part 7, as "persons who may accept responsible offices and retire or be released therefrom on political grounds." These provisions most plainly, in my opinion, though [393] indirectly, give adequate expression to an intention of the Legislative Council that the principle of responsible government should be established by law. In contrast with this power of appointment of responsible officers which is vested in the Governor

(1) See debate on the second reading of the New Constitution Bill, by Geo. H. F. Webb, assistant short-

hand writer to the Council, pages 68 and 69.

"alone," all other powers and functions are vested either in the "Governor" or in the "Governor and Executive Council" (sects. 49, 51, and 53), or in "the Governor with the advice of the Executive Council" (sect. 37). The provisions in these last-mentioned sections appear to apply to cases where, in addition to the advice, assistance, and approval of the responsible ministers, the nature of the power to be exercised seems to require that that exercise should be formally recorded or publicly announced. There is no indication in the Act that it was designed to create a single power or function in the Governor, except the power of appointing his ministers, as a personal power to be exercised on his own individual judgment or discretion, or otherwise than in accordance with the advice of those whom he selects to advise and carry into act and operation the constitutional exercise of the powers given to him by the statute law as the appointee and representative of the Crown. The Imperial Government has never, I believe, even in the boldest of its attempts to interfere illegally with the Victorian constitution, suggested that the Governor ought to exercise any of his statutory powers without receiving the advice of Her Majesty's Government for Victoria. It has only asserted for itself the right to disregard that advice, and to order the Governor, as its officer, to act in defiance of it (1). I think that the rule of responsibility applies to every one (if to any) of the powers of the Crown created by statute in the Crown's representative, the Governor, and that none of them can be lawfully exercised except through and by the advice or with the knowledge and approval of the responsible ministers appointed by the Governor. What are those powers? Some of them are merely formal, and their exercise and the approval of ministers would ordinarily be a matter of course (see sects. 8 and 32). Others are of a very different nature. Thus the appointment to public offices (sect. 37), including the general control of the public service, is a power not only of the highest importance but of very [394] large scope. Again, the power of convening and proroguing Parliament and of dissolving the Legislative Assembly (sect. 28) is one of large significance, and the exercise of it, undisturbed by any external influence, by the ministers whom the Governor is pleased to retain in the service of the Crown as his advisers is a matter of moment to the whole community as well as to political parties, and the movements of opinion in Parliament. Sects. 57 and 58 indicate, in my opinion, more clearly than all the others the intended scope and the legal and actual extent of the principle of responsible

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(1) See Despatch of the Duke of Sutton, Governor of Victoria, dated Buckingham to Sir Henry Mannors 1st January, 1868.



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government established by the Constitution Act. It is from the powers of the Crown express and necessarily to be implied from these sections, as well as from the powers of control over the public service, granted by sect. 37, that all the ordinary general functions of responsible government spring. From those powers the legal existence and the rightful exercise of those functions may and, in my opinion, must be inferred. It has been seen that the Legislature obtained by the Act not only the right to dispose by legislation of the waste lands of the Crown, but also the control, for the use and benefit of the people of Victoria by means of appropriations for specific purposes, of all the consolidated revenues derived from that and all other sources. This power covers, directly and indirectly, the whole field of parliamentary action outside the field of general legislation. Sect. 57, adopting a rule of the House of Commons respecting its grants of money for the public service, gives to the Crown, in the person of the Governor, powers equally extensive in their field of operation, and theoretically even greater, than those which either or both Houses of Parliament can claim in theory over the sources and the application of the public revenues. By this section the Legislative Assembly is prevented from making a grant of the smallest amount to the Crown or of imposing a burden of the lightest tax on the subject until the Governor by message recommends the Legislative Assembly to do it. By sect. 58 the revenue appropriated by an Act of the Legislature is prevented from being issued and applied to the purposes to which it has been appropriated until a warrant under the hand of the Governor authorizing the issue has been directed to the public treasurer. In both cases, in the sending of the message and in the signing of the warrant, the Governor is guided by the advice of his responsible [395] advisers. These express powers given to the Crown are in theory of great magnitude. They devolve in theory and in fact upon the government peculiar and most important functions. The government of Victoria, like the government of England, in this way has the duty cast upon it of determining by an initial and provisional appropriation to what purposes the public revenues shall be applied, by what taxes they shall be raised or increased, and at what times and in what manner, after they have been appropriated by an Act of the Legislature, they shall be issued and applied. In the exercise of these functions the government of Victoria, like the government of England, has to consider and determine beforehand what provisions must be made and what acts must be done for the proper administration of law and the prudent conduct of public

affairs, and generally for the peace, the security, the safety, and the welfare of the people. We violate no rule of legal construction, in my opinion, in holding that the government of Victoria possesses by virtue of the Constitution Act, in the exercise of this the most proper function of a government constituted as ours is, all the powers reasonably necessary for the proper exercise of this function. The rule of interpretation relied on by the plaintiff, “expressio unius est exclusio alterius,” is of limited application. It is not to be applied in construing any instrument where the general intention of the instrument appears to forbid its application. In cases where it is properly applied it does not operate to exclude powers that must be reasonably implied from the very words of the instrument by which express powers are created. (See per Lord Selborne in *Barton v Taylor* (1), and *Price v. Great Western Railway Co.*, (2). The common law rule, “Quando lex aliquid concedit, concedere videtur et illud sine quo res ipsa esse non potest,” on the other hand, is a rule which is founded on necessity, and is therefore of universal application. It is limited only by the necessity in which it has its origin. This rule justifies us, in my opinion, in holding that the government of Victoria, as constituted by the Constitution Act, possesses, by virtue of that law, the power to advise the doing by the representative of the Crown of any act which it would be competent for the Legislature of Victoria to sanction, and which [396] ordinarily is, or may under special circumstances at any time become, reasonably necessary to its existence as a body constituted by law or to the proper exercise of the functions which it is intended to execute: See *Doyle v. Falconer* (3); *Barton v. Taylor* (4). The question whether the power to do a particular act could ordinarily be, or might under special circumstances become, reasonably necessary for the government to possess and exercise, would, I think, present a question of law to be determined by the Court. The question whether the power to do such act is in fact or has become reasonably necessary to exercise must always be determined by Her Majesty’s government, who are responsible not to this Court, but to Parliament, for the exercise of the power as well as for the mode in which it has been exercised.

I will sum up the conclusions in which my mind abides after a careful re-examination of the vitally important questions which have been brought under our notice in the second division of this case. And I will first acknowledge that the Court is much indebted to the learned counsel on both sides, who have argued a

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(1) 11 App. Cas., 197, 207.

(2) 16 M. & W., 244.

(3) L. R. 1 P. C., 328.

(4) 11 App. Cas. 197.



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case full of difficulties and involved in great obscurity with distinguished ability, and have given us the results of their very extensive legal researches. I am of opinion, first, that the Constitution Act, as amended and limited by the Constitution Statute, is the only source and origin of the constitutional rights of self-government of the people of Victoria. Secondly, that a constitution or complete system of government by responsible advisers, as well as a constitution of the Houses of Legislature, was the design present to the minds of the framers of the Constitution Act, and that that design has found adequate, though obscure, legal expression in that Act. Thirdly, that the two bodies created by the Constitution Act, the Government and the Parliament of Victoria, have been invested with co-ordinate and inter-related, but distinct functions, and are designed on the model of the Government and the Parliament of Great Britain, to aid each other in establishing and maintaining plenary rights of self-government in internal affairs for the people of Victoria. Fourthly, that the executive government of Victoria, consisting of ministers of the Crown, are responsible to the Parliament of Victoria for the exercise of all the powers vested by the Constitution Act in the Governor as the representative of the Crown in Victoria, and that they, and they alone, have the right to influence, guide, and control him in the exercise of his constitutional powers created by the Constitution Act. Fifthly, that the executive government of Victoria possesses and exercises necessary functions under and by virtue of the Constitution Act, similar to and co-extensive, as regards the internal affairs of Victoria, with the functions possessed and exercised by the Imperial Government with regard to the internal affairs of Great Britain. Sixthly, that the executive government of Victoria, in the execution of the statutory powers of the Governor express and implied, and in the exercise of its own functions, has a legal right and duty, subject to the approval of Parliament and so far as may be consistent with the statute law and the provisions of treaties binding the Crown, the Government, and the Legislature of Victoria, to do all acts and to make all provisions that can be necessary, and that are, in its opinion, necessary or expedient for the reasonable and proper administration of law and the conduct of public affairs, and for the security, safety, or welfare of the people of Victoria.

It now only remains to consider whether Her Majesty's government for Victoria had the legal right to refuse to permit the plaintiff to land in Victoria, and to prevent and hinder him from landing. In the view I take of the legal and constitutional powers and

functions of the responsible ministers of the Crown in Victoria, I think that this question should be answered in the affirmative. The right to exclude aliens is a right that must be considered to be inherent in the constituted government of every independent State, and also, I think, in that of a quasi-independent State like Victoria. The exercise of this right is not forbidden to us by any rule of international law. If it were, it would have to be admitted that an act in contravention of such a rule, and constituting a cause of war between the parent State of Great Britain and another independent State, would be an act beyond the powers of the Government of this or any other dependency of the British Crown. It is not alleged in the pleadings in this case, nor has it been suggested in argument, that the exercise of the right to exclude Chinese aliens is a violation of the provisions of any of the treaties existing between Great Britain and China. It has been contended, but in my opinion unsuccessfully, that the exclusion of the plaintiff from [398] Victoria by the act of Her Majesty's Government is a violation of a statutory contract right of the plaintiff given to him by the provisions of the Chinese Immigrants Statute, 1865, and the Chinese Act, 1881. I have had the advantage of reading the judgment of my brother Kerferd. I concur with the views he entertains upon this part of the case, and I desire, with his permission, to adopt his reasons as a portion of my own judgment. It appears to me to be beyond doubt that the exercise by the government of Victoria of the right to exclude aliens is an act that may be necessary to be done in a variety of possible cases by the government of Victoria for the security, safety, peace, or welfare of the people of Victoria. The facts disclosed in this case, and the further fact of the proximity of Victoria to the French convict settlement of New Caledonia, suggest that it is highly probable that it may be necessary, in the existing circumstances of the present day, to exercise this power in Victoria at any moment. The proof of the existence of a legal right to do the act complained of by the plaintiff is completed, in my opinion, by the allegation that Her Majesty's Government for Victoria, in the discharge of its constitutional function—a function, I will repeat, the exercise of which this Court has no jurisdiction to review or to question—did in fact form the opinion and determination that it was necessary for the public peace that no further Chinese, other than British subjects, should be permitted to land in Victoria.

My decision is in favour of the defendant upon the questions of law raised on the pleadings, which constitute, in my opinion, a good defence to this action on the merits, and I am consequently of

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opinion that judgment in the action ought to be entered for the defendant with costs to be taxed. I have the misfortune, my sense of which I could not adequately express in words, to differ in opinion as to a part of this case from the majority of my brother judges. The decision of the full court is in favour of the plaintiff, and judgment will accordingly be entered for the plaintiff, with damages, if any, to be assessed, and costs to be taxed, as provided in the order.

KERFERD, J. :—

This was an action brought by Chun Teeong Toy, an alien Chinese' against A. W. Musgrove, Collector of Customs. The statement of claim is as follows :—

"1. The defendant is, and was at all times material to this action, Collector of Customs within the meaning of 'The Chinese Act, 1881.'

"2. The plaintiff was an immigrant arriving from parts beyond Victoria within the meaning of 'The Chinese Immigrants Statute, 1865,' and 'The Chinese Act, 1881.'

"3. The plaintiff, on or about the 27th day of April, arrived in Hobson's Bay from parts beyond Victoria, on board the ship 'Afghan,' the said ship being a British ship, and one George Roy was the master of the said ship within the meaning of 'The Chinese Act, 1881.'

"4. The said master, George Roy, offered to pay, and was always ready and willing to pay, to the defendant as such collector as aforesaid, in respect of the plaintiff, the sum of 10*l.*, as provided in section 3 of 'The Chinese Act, 1881,' yet the defendant refused to allow the plaintiff to land in Victoria, and hindered and prevented the plaintiff from landing in Victoria, and altogether refused and declined to receive the said sum of 10*l.*

"The plaintiff claims 1,000*l.*"

The defendant in answer pleads several pleas, the fourth of which only is material in the consideration of these proceedings, and is as follows :—

"The plaintiff was at the time of the committing of the grievances in the statement of claim mentioned a subject of the Emperor of China, and owed allegiance to him, and was not a British subject, and that, whilst the several Acts of Parliament of Victoria mentioned and referred to in the second paragraph of the statement of claim were in full force and unrepealed, the plaintiff was a Chinese immigrant within the meaning of the said statutes, and as such immigrant had arrived in the port of Melbourne in a

certain British vessel called the *Afghan*, of 1,439 tons measurement, which said vessel had so arrived in the said port with 268 Chinese immigrants on board, being 254 more Chinese immigrants than under the said statutes such vessel could lawfully bring into the said port of Melbourne. And the defendant further says that he had received instructions, previous to the arrival of the said ship, from the Commissioner of Trade and Customs, as being the responsible minister of the Crown for the Colony of Victoria charged and instructed with the administration of the laws of the [400] said colony relating to the customs and immigration, that there was an apprehension on the part of Her Majesty's government for the said colony that a large influx of Chinese into the said colony was imminent, and that in the opinion of the said minister and of the said government such influx would be a danger and menace to the said colony, and to the public peace thereof, and to Her Majesty's subjects residing therein, and would be in a high degree detrimental to their interests, and that in the opinion of the said minister of Her Majesty's government it was for the advantage of the said subjects so residing in the said colony that such influx should be prevented, and no further Chinese other than such as are British subjects should be allowed to enter the said colony, and that the said minister and Her Majesty's government had determined to refuse to permit any Chinese other than such as were British subjects to land or enter the said colony, and such instructions, opinions, and determination had been, before the committing of the said grievances, by the said minister and government communicated to the defendant; wherefore the defendant, in obedience to such instructions and determination, as such officer of Her Majesty's Customs as herein-before mentioned, by command of our Lady the Queen, refused to permit the plaintiff to land in the said colony of Victoria, and hindered and prevented him from so landing, and wholly declined and refused to receive the said sum of 10*l.* mentioned in the fourth paragraph of the statement of claim. And the defendant further says that his said acts in so wholly refusing to permit the said plaintiff to land in Victoria, and in so hindering and preventing him from landing, and in refusing to receive the said sum of 10*l.* as aforesaid, were by him subsequently reported and communicated to Her Majesty's said responsible minister, and were by him and by Her Majesty's said government ratified and approved of as being acts of state policy." The plaintiff, under the provisions of Order xxv., r. 2 of the Judicature Act, objects that paragraph 4 is no defence, as even Her Majesty's said minister or said Government could not legally prevent the plaintiff from land-

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ing. The short question we have to consider is whether paragraph 4 of the defence is an answer to the plaintiff's claim. Paragraph 4 may be conveniently divided into two parts, each of which raises a [401] separate defence—the first part dealing with the statute law on our statute books relating to the Chinese, and the second part involving the consideration of the constitutional powers conferred upon the government of Victoria. Dealing first with the statutable provisions relating to the Chinese, it was admitted for the purposes of the argument that the master of the British ship *Afghan* brought 268 Chinese to the colony, that that number was in excess of the tonnage allowance under sect. 2 of the Chinese Act 1881, No. 723, and also that the master tendered on behalf of the plaintiff to the defendant, as Collector of Customs, the sum of 10*l.* for each and every of such 268 Chinese, alleged to be payable under the provisions of sect. 3 of the said recited Act, which the said defendant refused to accept under the circumstances mentioned in the plea. The plaintiff complained that he suffered wrong in being deprived of his statutory right, as he said, of being allowed to land in Victoria on payment of the 10*l.*, and therefore claimed damages. It was contended for the plaintiff that he could not be said to be illegally in the territory when he was willing to pay the 10*l.*; that the law as to the number of Chinese that were allowed to come in in any vessel only affected the master of the vessel; that no matter how the plaintiff got here, when he was ready to pay the poll tax it ought to have been accepted; and finally, that the Chinese Act 1881 did not prohibit and say that Chinamen shall not come into the colony in greater numbers than one for every hundred tons of the ships's register, but that if a ship came into the colony with a greater number than was therein specified, the captain rendered himself liable to a penalty. It was further contended, on behalf of the plaintiff, that sect. 3, which provides, "Before any immigrant arriving from parts beyond Victoria shall be permitted to land from any vessel at any port or place in Victoria, and before making any entry at the customs, the master of the vessel by which such immigrant shall so arrive shall pay to the Collector or other principal officer of customs the sum of 10*l.* for every such immigrant," &c., gave to every Chinese who thought proper to come to this country a right to land upon payment of the sum of 10*l.* The answer to this part of the case is, in my opinion, to be found in the proper construction to be placed upon the Chinese Act, 1881, No. 723, which appears in our statutes under the heading of "Chinese [402] Immigration Restriction." If sect. 3 could be taken by itself and construed as a separate legislative enactment dealing with the

circumstances under which the Chinese should be permitted to land in Victoria, there might be some force in the contention of the learned counsel for the plaintiff that he had a right to land upon satisfying the conditions of that section. I would say that the Act must be construed as a whole, the same as any other written instrument would be, and that we must ascertain from its provisions what was the intention of the Legislature in passing it. The provisions of the Chinese Act, 1881, which is to be read and construed with the Chinese Immigrants Statute, 1865, will, I think, shew that it was the design of the Legislature to impose such restrictions upon Chinese coming into Victoria by sea as to prevent the possibility of their coming in large numbers at any one time, and to prevent what might be called a "Chinese immigration," by restricting the number of Chinese that can come in any vessel to such an insignificant number as not to make it worth the while of any vessel carrying passengers only to bring them. Sect. 2 provides, "If any vessel having on board a greater number of immigrants (within the meaning of the Act No. 259) than in the proportion of one such immigrant to every hundred tons of the tonnage of such vessel shall arrive at any time in any port in Victoria, the owner, master or charterer of such vessel shall be liable, on conviction, to a penalty of 100*l.* for each immigrant so carried in excess of the foregoing limitation." Sect. 8 provides, "Any vessel on board which immigrants shall be transhipped from another vessel shall be brought to any port or place in this colony shall be deemed to be a vessel bringing immigrants into the said colony from parts beyond the said colony, and shall be subject to all the requirements and provisions of this Act, and all immigrants so transhipped and brought to such port or place shall be deemed to be immigrants arriving from parts beyond Victoria." Sect. 8 was evidently framed by the Legislature with the intention of guarding against any evasion of sect. 2 being attempted by transshipping Chinese passengers in Australian waters, because the vessel into which they are so transhipped is to be deemed a vessel bringing immigrants into the said colony from parts beyond the said colony [403] and is to be subject to all the requirements and provisions of the Act. Sects. 5, 6, and 7 may be looked at as also shewing that the Legislature intended that the stringent provisions of the Act should not be evaded, and, therefore, made provision by these sections for exemptions in certain cases. For example, Chinese who are British subjects are exempted, Chinese officials accredited to the colony by the government of China are exempted. The crew of any Chinese vessel are permitted to go on shore in performance of

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their duties in connection with such vessel, but if one of them were to go on shore except in performance of such duties, he would be liable to a penalty of 20*l*. It is an ordinary rule of construction that “if authority is given expressly, though by affirmative words, upon a defined condition, the expression of that condition excludes the doing of the act authorized under other circumstances than those defined, *expressio unius est exclusio alterius*.”—Per Willes, J.: See *North Stafford Steel Co. v. Ward* (1), and Broom’s Legal Maxims, 5th edit. 653. I would say that the proper construction to be placed upon the Chinese statutes is that Chinese coming into this country must come in the manner prescribed by the statutes, and that everything in respect of which a penalty is imposed by statute must be taken to be a thing forbidden, though it is not expressly prohibited by the statute. If the Chinese do not come into Victoria in the way prescribed, they are prohibited from coming here by the Act. A good deal of argument was addressed to the court that it would be placing a harsh construction upon the statutes to make the immigrants liable for the misconduct of the master in bringing them here. The master of the ship is constituted by the Chinese Act, 1881, sect. 3, the agent of the immigrants to pay the poll tax, and, what is very significant with reference to these proceedings, he must do this “before making any entry at the customs.” This provision would indicate that it was the intention of the Legislature that the master of the ship should be met at the threshold, and if he could not satisfy the customs authorities that he had complied with the provisions of the Chinese Act, 1881, he should not be permitted to enter his ship as being in port. It will be found that this provision fits in with the Customs Act, [404] 1883, sects. 66 and 71, requiring the master of every ship to report his vessel in port. Both Acts ensure that the customs authorities shall be informed of the condition of the ship before she is allowed to use the port for landing her passengers and cargo. Can the Chinese immigrants dis sever themselves from the master of the ship so as to be able to disavow his fraudulent acts, and yet take the benefit of those acts in bringing them here? The master, in bringing the passengers here, comes in their service to land them here, and he does so confessedly on the facts in this case in fraud of the Chinese Act, 1881. I am not aware of any authority for the proposition that a person may take the benefit of a fraudulent act committed in his service, even although it be without his knowledge or his authority. In the case of a ship running a blockade where the owners of cargo were entirely innocent, and had no knowledge

of the intention of the master to run the risk, it was held that the owners of the cargo were concluded by the illegal act of the master, although it might be done contrary to their wishes, and without their privity, yet as it was done in the service of the cargo, the owners of the cargo could not claim to be exempt from the illegal act of the master of the ship: See *Baltazzi v. Ryder* (1). Carriers of passengers stand, no doubt, on a different footing from carriers of goods as to their rights under their respective contracts, but the legal principle that a man cannot take advantage of a fraud committed in his service would apply in both cases. "The principle of public policy is this, *ex dolo malo non oritur actio*, no court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If, from the plaintiff's own stating, or otherwise, the cause of action appear to arise *ex turpi causâ*, or the transgression of a positive law of this country, there the court says he has no right to be assisted:" Broom's Legal maxims, page 739, 5th ed. Fraud vitiates everything. In *Foster v. Mackinnon* (2) which was an action on a bill of exchange, the plaintiff was the endorsee and the holder for value before maturity, and without notice of any fraud. On the finding of the jury that the bill of exchange had been obtained from the defendant by fraud, the plaintiff, though perfectly innocent, could not recover. The plaintiff founds [405] his claim upon the fact that he is here already and is willing to pay his 10*l.*, and he says it is immaterial that he was brought here by the fraudulent act of the master of the ship. I am of opinion that he cannot succeed. I should have been content to rest my judgment on the first part of the fourth plea, and say that the intention of the Legislature in passing the statutes was to prohibit the Chinese from coming into Victoria except in the manner prescribed by the Act, and that the fraudulent act of the master of the Afghan, in bringing Chinese into the port of Melbourne otherwise than in the way provided for by the Act, would give no right of action to any Chinese on board the ship on the ground that he was not permitted to land. But it is possible that the judgment of this Court may not be accepted by the parties. I, therefore, felt it to be my duty to express an opinion on the other branch of this case. It was stated by the learned counsel for the plaintiff that in dealing with this case they were treading on what was an unknown path to most of them. I am not aware of any decided cases upon the powers conferred under the system of responsible government granted to the self-governing colonies, saving those of *Dill v.*

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(1) 12 Moore, P. C. C. 168.

(2) L. R. 4 C. P. 704.



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*Murphy* (1) and *Taylor v. Barton* (2). The precise question now under consideration, however, did not arise in those cases, and, as far as I have been enabled to search, there is no judicial decision on the points raised by the second part of the fourth plea. The opinions of learned text writers were cited during the able arguments of counsel on both sides, but I would say that the extracts we were favoured with, valuable and weighty as they are, do not assist us very much in arriving at a conclusion upon the issue we have to determine, namely—What are the constitutional powers conferred upon the government of Victoria? The second part of the fourth plea briefly sets up, as an answer to the plaintiff's claim, that the act of the defendant in prohibiting the plaintiff from landing was an act of state, done by him under the authority of a responsible minister of the Crown for the Colony of Victoria. And the defendant further says, that his said acts in so refusing to permit the said plaintiff to land in Victoria were, by the said government, ratified and approved of as being acts of state policy. I [406] understand that it is the substance of this plea and not the technical form of it (which may be amended) that we have to consider. The Crown, during the argument, relied upon the plea being justified, on the ground that it was an act of state policy, or an act done under the exercise of the Royal prerogative. Within the British dominions there are a number of States, or Colonies, each having and exercising within its own territorial limits, and with regard to its own internal affairs, sovereign power, and being for all such purposes an independent governing body. But any act committed by any one of such States or Colonies affecting a foreign power would be rightly regarded by such foreign power as an act of the British nation, and if the act were a *casus belli* it would have to be defended by the British nation. I do not think that the government of Victoria can justify the act done with regard to the plaintiff as an act of state policy, unless it had been previously authorized by the Queen upon the advice of her imperial advisers, or ratified by such authority. An act of state policy means an act done by the British nation to an alien who would have no cause of action in any court within the British dominions in respect of such act. The plea of "act of state policy" ousts the jurisdiction of the Court when pleaded by competent authority. It was not contended that the act complained of in the statement of claim was so authorized or ratified. I am therefore of opinion that the plea that the act was an act of state policy is not any answer to the action. With regard

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(1) 1 Moo. P. C., N. S. 487.

(2) 11 App., Cas. 197.

to the second ground, that it was an act done under the authority of the Royal prerogative right of the Crown to exclude aliens, the question for our decision was narrowed down during the argument to a claim on behalf of the Crown that the Constitution Act, or the powers derived under it, must be interpreted as conferring all the prerogatives and powers necessary for the administration of the law and conduct of public affairs in this colony, including the right to exclude aliens. On the other hand, the plaintiff denies that any prerogative other than those expressly specified in the Constitution Act, 19 Vict., and the Governor's commission, can be exercised here by responsible ministers of the Crown. The plaintiff further denies the existence of the prerogative to exclude aliens, and says that if it does exist it has not been extended to Victoria. The issue lies in a small compass, and the determination of it must be [407] sought for and found in an examination of the powers contained in the constitution under which Victoria is governed. The court takes judicial notice of the powers contained in the Constitution Act, 19 Vict., and in all Acts of the Parliament of Victoria amending the same. I think it will also take judicial notice of the fact that Parliament is constituted by three branches of the Legislature—the Queen, the Legislative Council, and the Legislative Assembly, that the Governor represents the Queen, and in that capacity is the head of the executive government, and that ministers of the Crown forming the executive are responsible to Parliament. The court will also take judicial notice of “the law of nations”—“the law and customs of Parliament”—“the privileges and course of proceedings of each branch of the Legislature”—Taylor on Evidence, 8th ed., vol. 1, p. 4, and that the privileges, immunities, and powers of both the Legislative Council and the Legislative Assembly have been defined to be powers held and enjoyed by the Commons House of Parliament of Great Britain and Ireland not inconsistent with the provisions of the Constitution Act (see Act No. 1, Vol. 3, Victorian Statutes, p. 2395; and *Dill v. Murphy*(1). The constitution of Victoria was created by and under the authority of the Act 18 & 19 Vict., c. 55. The schedule to that Act is printed in our statutes as 19 Vict., and sect. 60 provides that the Legislature of Victoria, as constituted by that Act, shall have full power and authority from time to time, by any Act or Acts, to repeal, alter, or vary all or any of the provisions of the said Act, and to substitute others in lieu thereof. A learned writer has described, and I think accurately, the Parliament of Victoria as being a subordinate yet a legislative and constituent assembly, having power

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to completely change the constitution contained in the Act 19 Vict. "It is a 'subordinate' assembly," because "its powers are limited by the legislation of the Imperial Parliament; it is a constituent assembly, since it can change the articles of the Victorian constitution." (Dicey's Law of the Constitution, 2nd ed., pp. 101 and 102.) Again, at page 103, the same learned author says, "The Colonial Legislatures, in short, are, within their own sphere, copies of the Imperial Parliament. They are, within their own sphere, sovereign bodies, but their freedom of action is controlled by their [408] subordination to the Parliament of Great Britain." (1) The power conferred by sect. 60 has been largely availed of by the Parliament of Victoria. The Act 19 Vict. contained originally sixty-three sections; of these eighteen sections have been wholly repealed, and two sections have been partly repealed. On the other hand, a number of Acts moulding the constitution, so as to give full effect to responsible government, have been passed by our

(1) The problem which perplexed the minds of statesmen forty years ago, of whether it would be possible to transplant a copy of the British constitution in such of the dependencies of the Empire as had outgrown the form of government which obtains in Crown Colonies, must, I think, so far as Victoria is concerned, be considered as having been successfully solved. I do not think that it can be denied that we have here in Victoria a responsible Government as fully as it obtains in the mother country. The Legislative Assembly of Victoria is an exact copy of the British House of Commons, save as to the number of members, divisions being taken in lobbies, and the clôture standing orders. The same prerogatives are used and exercised by the Crown with regard to the proceedings in both the House of Commons and the Legislative Assembly. There is not a ceremony, procedure, or form, from the opening of Parliament down to a junior clerk tying and docketing a bundle of papers when attending a select committee, in which the ceremony, procedure, or form are not identical

in both Houses; nor is there a privilege used, held, or enjoyed by the House of Commons which is not used, held, or enjoyed by the Legislative Assembly, modified, if at all, only to the extent necessary by the altered conditions under which they are brought into operation. Ministers of the Crown in the Legislative Assembly, when Parliament is in session, have that "bad half hour" when questions are put, the same as Ministers of the Crown in the House of Commons. The pulse of national life beats vigorously. Information is sought and the policy of the government obtained with regard to every question which affects the welfare of the people. No matter which touches the people is too great for the attention of the House, and no matter is too small for its consideration if a wrong has to be righted. The Imperial Parliament is the supreme authority throughout the Empire. The Victorian Parliament is the supreme authority in and for Victoria, subject only to the legislative powers of the Imperial Parliament.

Parliament under the powers of the Act 19 Vict. One Act I have referred to, the Act No. 1, declaring the privileges, immunities, and powers of the Legislative Council and the Legislative Assembly respectively to be those held, enjoyed, and exercised by the Commons House of Parliament of Great Britain, not inconsistent with the provisions of the Constitution Act. Another Act of great importance is "The Officials in Parliament Act, 1859," limiting the number of responsible ministers who may sit and vote in Parliament, and dealing with other matters. Since the Constitution Act, 19 Vict., came into operation, thirty-three years have nearly run their [409] course, and during that time thirteen Parliaments have been created, and twenty or more responsible ministries have been appointed. It is general knowledge that during that time most serious questions have arisen, involving the consideration of the constitutional powers conferred by our constitution upon the several branches of the Legislature. These questions have from time to time been determined by the unwritten law of Parliament, the *lex et consuetudo Parliamenti*. Again, the administrative acts of responsible Ministers in the exercise of those discretionary powers of government resting in the Royal prerogative) have been frequently challenged with respect to such acts, and ministers have had to stand or fall by the decision of Parliament thereon. I think it will be obvious, from this brief consideration of the constitutional powers which have been and are now actually exercised in Victoria, that the constitution under which Victoria is governed rests on a wider basis than the actual terms of the Constitution Act, 19 Vict., would appear to indicate. If the plaintiff's contention were a sound one, it would follow that the prerogatives forming part of the common law, which are separate from those in connection with the Legislature, and which before and since the inauguration of responsible government have been enforced by this court, have been so enforced illegally. For if the Crown is restricted to the use of those prerogatives mentioned in the Constitution Act and the Governor's commission, then all other prerogatives must be deemed to be excluded. I can find no authority in support of such a contention, but I think there is some authority the other way. "No distinction can be drawn between the rights of the Crown as regards prerogative in this country and in the colonies wherever Her Majesty's dominions extend:" *In re Bateman's Trust* (1), see also *In re Oriental Bank Corporation, ex parte the Crown* (2). Assuming the decisions in these cases to be good law, and that the prerogatives forming part of the common law, applicable to the circum-

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(1) L. R. 15 Eq., 355.

(2) 28 Ch. D. 643, 649.



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stances of this colony, were in force here before the passing of the Constitution Act, that Act must have contained express words, before those prerogatives could be taken away: See *Weymouth v. Nugent*(1), *Attorney General v. Constable*(2), and Chitty on Prerogative, p. 33. It is one of the prerogatives of the Crown that it is never bound unless named in a statute. The maxim *expressio unius est exclusio alterius*, relied upon to support the plaintiff's contention, is not of universal application, but depends upon the intention as discoverable upon the face of the instrument: See *Saunders v. Evans* (3). Now, what was the intention of the Imperial Parliament in passing the Act 18 & 19 Vict., c. 55, of which our Act 19 Vict. formed the schedule? Clearly to grant to the people of Victoria responsible government. A glance at the Act 19 Vict. will shew that its provisions were intended to enable the Parliament called into existence to work out the necessary machinery for the purpose of giving full effect to the operation of responsible government, and that it was not intended thereby to restrict the government to the use of the prerogatives mentioned, because there are prerogatives not mentioned which are absolutely essential to give life to responsible government. The plaintiff's contention, limiting the prerogatives in force in Victoria to those specified in the Constitution Act, 19 Vict., and the Governor's commission, namely. the convocation, prorogation, and dissolution of the Assembly, the right to the royal minerals, the power to appoint courts, and the prerogative of mercy, cannot, in my opinion, be sustained. The system of responsible government would be utterly unworkable without the discretionary prerogative powers vested in the Crown, and which are not provided for by any statute. I shall not attempt to describe what are termed the parliamentary prerogatives. Sir J. Erskine May, in his 9th edition, page 6, says:—"The prerogatives of the Crown in connection with the Legislature are of paramount importance and dignity." I would say that all the prerogatives necessary for the safety and protection of the people, the administration of the law, and the conduct of public affairs in and for Victoria, under our system of responsible government, have passed as an incident to the grant of self-government (without which the grant itself would be of no effect,) and may be exercised by the representative of the Crown, on the advice of responsible ministers. There are prerogatives of the Crown creating a right and duty of which the law must take cognizance, although the law does not en-

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(1) 6 B. & S. 22.

(2) 4 Ex. D. 172, 174.

(3) 8 H. L. C. 721.

[411] force performance of them : See Fry, J. in *Attorney General v. Tomline*. (1) It was held in that case that there existed in the Crown the right and duty, as part of the prerogative of the Crown, to preserve the realm from the incursions of the sea. The prerogative right to exclude aliens is one which the law must take cognizance of, although the law could not enforce the performance of the duty to protect the people of this country from an influx of aliens. It was contended that the prerogative right to exclude aliens is part of the prerogative of war and peace. I do not think that it is, and I think that it will be found that the right to exclude aliens has been exercised by other nations of the world who have not been at war with the country whose subject has been expelled or excluded by them. It was also contended that this prerogative had been lost by desuetude. Some prerogatives, no doubt, have become obsolete by disuse, but those prerogatives have been where the Crown exercised power which had been surrendered to or acquired by Parliament. The prerogative of excluding aliens is a power in the Crown for the protection of the people from foreign aggression, and stands on a totally different footing from those prerogatives used in the internal government of the kingdom which may have been taken away by Parliament or lost by desuetude. It was argued that by the passing of the Chinese Acts the prerogative of excluding them altogether had been taken away. I doubt whether that would be so if the Chinese had come in conformity with the Chinese Acts, the Crown not being named therein. I am perfectly clear that it is not so when they come in fraud of those Acts. I have said that the Court will take judicial notice of the law of nations. Self-preservation is the first law of nations as it is of individuals. I do not desire to refer to the opinions of learned text writers on international law cited during the argument, but it seems beyond all question that every nation may exercise the right of excluding aliens without giving offence to the country to which those aliens belong. As between nation and nation, it appears to me that the Government of Victoria has kept well within the rights of the British nation in excluding the Chinese, subject, of course, to any treaty obligation of which no mention was made. The question as to whether the [412] government of Victoria can exercise such a power is a matter between this colony and the mother country. From an international point of view, the act of the Government of Victoria would be the act of the nation, and one for which the nation would have to bear any responsibility attached thereto—for example, the *Shenandoah Case*. The government for the time being is responsible for the

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(1) 12 Ch. D. 214, 232.



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peace, safety, and well being of the community. So long as their acts are within the authority of law, this court is not concerned as to the grounds of justification for the steps taken by them. That is a matter for Parliament. I would say that the Crown of Victoria, upon the advice of responsible ministers, if they had reasonable grounds to apprehend that this country was likely to be overrun by the influx of a large number of aliens who were coming here, not for the purpose of passing through the country but to settle here, and who might, in course of time, outnumber and dominate over the people who have made this country what it is, or who might disturb the peace of the country by coming here, have the power to exclude such persons and prevent them from landing here. With regard to the contention that the prerogatives of the Crown could only be exercised on the personal authority of the Queen, the constitutional usage, which has now become a part of our constitutional law, is that the Royal prerogatives, with one exception, as far as I remember, namely, the right of Her Majesty to dismiss her ministers from office, which the incoming ministry must defend and be responsible for, can only be exercised upon the advice of the responsible advisers of the Crown, and any attempt to exercise those powers by the Queen, or by her representative without advice, would involve the resignation of her ministers. We cannot learn, and have no right to ask in this Court, whether any advice, or what advice, has been tendered to Her Majesty. She is the head of the government here, and the presumption would be, that whenever the discretionary powers of the Crown resting in the Royal prerogative have been exercised for the safety or protection of the people and for the good government of the country, and her responsible advisers continue in her service, that the prerogative has been properly exercised. The constitutional effect of this change in the manner of exercising the prerogative is to transfer the power of the [413] prerogative from the Crown to the people, as represented by the Commons in Parliament, to whom ministers, upon whose authority it is exercised, are responsible. I am, therefore, of opinion that the second part of the plea, if amended as suggested, would also be an answer to this action.

WILLIAMS, J. :—

Having regard to what is stated in the judgment of the Chief Justice, it is quite unnecessary for me to notice the nature of the pleadings in this action further than to observe that the fourth paragraph of the defence raises two defences :—(1.) (which I place first merely for the sake of convenience, and in order

to dispose of it)—That the wrongful act complained of was done by the defendant to an alien, and was adopted by the responsible advisers of the Crown, in and for the Colony of Victoria, thus, it is alleged, converted into an act of State ; (2.) That the right or power to exclude aliens from the territory of Victoria is vested in the Governor of Victoria, to be exercised by him under and in accordance with the advice of his responsible ministers ; that in this case his responsible ministers exercised the powers so vested, and that the sanction or concurrence of the Governor to or with the exercise of that power is to be presumed from the fact that he has continued the ministers who so exercised it in office as his responsible advisers. Upon this second line of defence it is important to note that the Attorney-General, at the outset of his argument, admitted that he relied upon no sanction, concurrence, or assent of the Governor other than that to be inferred from this continuance in office. These being the two lines of defence, I will, for the sake of convenience, deal first with that which may be shortly called the act of state defence. The answer to this is simply that that which is called and relied on in the present case as an act of state is no act of state at all. A wrongful act done to an alien, if ratified by the sovereign power, would undoubtedly become thereby an act of state, for which the alien could [not] seek redress in the municipal courts of the sovereign power. But this colony is not a sovereign power ; as far as we are concerned, the Imperial Government alone occupies that position, nor is the sovereign power vested in the Governor of this colony, and to render the act complained of an act of state, either the ratification of Her Majesty's Imperial advisers would be required, or, if the sovereign [414] power were vested in the Governor, the ratification of the Governor. This principle is clearly established by the judgment of the Privy Council in the case of the *Secretary of State in Council of India v. Kamachee Boye Sahaba* (1). The result of the judgment in that case is stated at p. 86 in these words :—“ The result, in their Lordships' opinion, is that the property now claimed by the respondent has been seized by the British Government acting as a sovereign power, through its delegate, the East India Company ; and that the act so done, with its consequences, is an act of state over which the Supreme Court has no jurisdiction ” (the important fact in that case being the fact that the East India Company was the delegate of the sovereign power). Even more forcibly and clearly is the same principle established by

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the judgment of Mr. Baron Parke (1) cited, approved of and acted upon by the Privy Council in the case of *Musgrave v. Pulido* (2). If the Governor of this colony has the sovereign power vested in him, it is clear that, outside his commission, there is nothing else which so vests it. But there is no such delegation, or anything approaching to it, contained in his commission. The Governor of this colony is clearly not a Viceroy, as is commonly supposed, and the term viceregal is inappropriate to the position he occupies. He is merely an officer of the Imperial Government, with a limited authority from the Crown, and "his assumption of an act of sovereign power, out of the limits of the authority so given to him would be purely void, and the courts of the colony over which he presided could not give it any legal effect" (3). No person, or body of persons, in this colony is the alter ego of the Sovereign; to no person or body of persons has there been a delegation by the Sovereign of the whole royal power; and as this colony is manifestly not a sovereign power, but is only the colony or dependency of a sovereign power, no sanction or ratification can be exercised here which would have the effect of merging in an act of state the wrongful act of a subject to an alien, and so barring the alien from seeking redress in our courts of justice. The cases I have referred to are, I think, sufficient to dispose of this branch of the defence, and it now remains to consider the other, and by far the more important. Have we in [415] this colony the right or power to exclude aliens from our territory? Is that power vested by law in the Governor of this colony, so as to be exercisable by his responsible advisers? I limit the question purposely in this way, for it is not pretended either that any such power is vested in the Governor by his commission, or that, however it may have been vested, it has been exercised in any other way than through his responsible advisers.

Upon this second line of defence lengthy and elaborate argument has been addressed to the court, chiefly upon the points (1.) As to whether the prerogative or right to exclude aliens ever existed in England; (2.) Whether, if it ever existed, it has not fallen into disuse; (3.) As to the effect of non-user; (4.) As to whether the legislation as regards Chinese in force in this colony does not give members of that particular nationality a statutory right to enter the colony upon compliance with the statutory conditions. All these questions are no doubt full of interest, and elaborate treatises might be written upon them. But I do not desire to decide more than is necessary; and if a decision upon one, and that the most

(1) *Cameron v. Kyte*, 3 Knapp, 332.

(2) 5 App. Cas. 102, 109, 110.

(3) See *Musgrave v. Pulido*, 5 App. Cas. p. 110.

important and substantial point in the case, decides this portion of the defence in favour of the plaintiff, it is manifestly unnecessary to express an opinion upon any other point, however interesting the expression of an opinion upon that other point might be. I will assume therefore, without offering any opinion thereupon, that the prerogative or right referred to did and does exist in England, that it has not there fallen into disuse, or that, if it has, such non-user does not affect or prevent its exercise there. But, making all these assumptions in favour of the defendant and against the plaintiff, none of them affect the main and substantial question in the case, and the only question with which I am concerned, and that is this, whether, *under any law* in force in Victoria, the Governor, or the Governor with the advice of his ministers, or ministers [*per se*], has or have the power expressly or impliedly, to exclude aliens from our territory. Just as in regard to that branch of the defence which I have dealt with first, we find no trace of a delegation of the sovereign power to the Governor in his commission, so by the same instrument is there nothing approaching to a power to exclude aliens vested in that officer. If it exists, therefore, here at all, it must be by virtue of some law in force in Victoria, and, unless it be [416] by virtue of our Constitution Act, there is no other law under which it can be contended that we get such a power, either expressly or by implication. Then, again, it has not been pretended, nor is it pretended, either upon the pleadings or in argument, that the Governor has exercised this alleged power personally, or by virtue of any authority the exercise of which is vested in him personally, but the position taken is that the power claimed has in this case been exercised by ministers with the sanction and concurrence of the Governor, signified by their continuance in office. Therefore, the one and only necessary point to be considered is this,—is the power claimed vested by any law in force in Victoria in the Governor, and is that power, if so vested, to be exercised through his ministers? If I come to the conclusion that no such power exists in Victoria, then it is manifestly not only unnecessary for me to consider the other points to which I have referred, but also the point whether Chinese who comply with the statutory conditions have or have not a statutory right to be admitted into our territory.

I confess I have come to the conclusion at which I have arrived with great reluctance. I fully recognise the importance of our decision, and of its possible effect upon the future of this colony. I do not hesitate to say that, if the conclusion at which I have arrived be a right one, we have no legal means of preventing cargoes of alien convicts, if they were sent here to-morrow, from landing on

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and polluting our shores. I have been for years, in common with, I believe, very many others, under the delusion (as I must term it), that we enjoyed in this colony responsible government in the proper sense of the term. I awake to find, as far as my opinion goes, that we have merely an instalment of responsible government. It would have given me sincere satisfaction to have been enabled, in pronouncing my judgment, to have expressed my concurrence with the conclusion of the Chief Justice upon this point ; but I have felt myself forced as a lawyer, construing our law as a lawyer, to differ from him on this most important question, namely, as to what is the system of responsible government which we have had granted to us in Victoria ; or, to put it more concretely, does the system of responsible government granted to us, be its measure full or scanty, include the power or right to prevent aliens from landing on our [417] territory ? The answer to this question must depend on the construction placed upon our Constitution Act. As I understand the judgment of the Chief Justice, he holds that, under that Act, so far as regards our internal affairs, and only so far as they are concerned, we have had granted to us a full and complete system or measure of responsible government. In this he holds to be included the right to prevent aliens landing on our shores, inasmuch as, in his opinion, the exercise of that right relates to the management of our internal affairs, and is a right which it may be necessary to exercise for the preservation of our own territory. I do not, at the outset, think that it is clear that the right claimed to exclude aliens is not one which affects and concerns Imperial interests ; in other words, I do not think it is clear that it relates solely to our own internal affairs and interests ; but, passing that by with an expression of doubt, undetermined for the present, I do not think we have the right or power claimed. The Governor, either with or without the advice of ministers, has, as we have seen, no such authority conveyed to him by his commission ; then in what law or instrument is the power alleged to be contained ? All, as I understand, are agreed that, if it exists anywhere, it exists in the Constitution Act, and that if it exists it exists within the limitation to which I have just referred. Whether, therefore, we affirm that the power exists, or deny its existence, it is to a consideration of what has passed to us under the Constitution Act that we are driven. I do not hesitate to say that the phraseology of the Act is so vague and obscure in parts as to create grave doubts as to its meaning, where no doubt need have existed, and that a study of it leaves the impression upon one's mind that those who framed it, from the colonial point of view, were fearful of expressing too plainly, either what were the

privileges and rights sought and thought to be obtained by it, or, on the other hand, from the Imperial point of view, of stating too bluntly what rights and privileges it was intended should not pass to the colony under it.

Passing now to an examination of the Constitution Act, what principles of construction should we apply, and applying those principles, what privileges and rights, generally and briefly, pass to this colony under it? If the object of the Act was to create a system of responsible government in Victoria, and if a system of responsible government was created by the Act, there can be no [418] doubt that to the construction of the Act we should apply the principles—(1.) that the grant of that system, whatever it may amount to, carries with it a grant of all such powers as are necessary to the existence of that system, and to the proper exercise of the functions inherent in or incident to that system: *Barton v. Taylor* (1), and (2.) that whenever a law grants anything it impliedly also grants that without which the thing granted could not exist (*quando lex aliquid concedit concedere videtur et illud sine quo res ipsa esse non potest*): *Barton v. Taylor*, p. 207. Further, that to the construction of such an Act as the one now in question we should apply with caution another equally well known maxim, *expressio unius est exclusio alterius*. Now, to begin with, looking merely at the Act itself which, in construing this or any other Act of Parliament, is the legitimate course), and not at despatches or speeches in the Imperial or any other Parliament (which, for the purpose of giving a legal construction to legislation, are, in my opinion, clearly valueless), it is, at the least, open to doubt whether it was the primary object of the Act to create even a system of responsible government in Victoria. If that was its primary object, then it is very singular that there is no mention whatever of so high or important an object in the preamble, though there is express mention of another, and certainly not more important object,—“Whereas it is expedient to establish in the said colony separate Legislative Houses, and to vest in them as well the powers and functions of the Legislative Council now subsisting as the other and additional powers and functions hereinafter mentioned.” I take leave, therefore, at the outset, to doubt whether, keeping strictly within the four corners of the Act, it was its primary object to create a system of responsible government. I think its primary object and intention was to do that which is stated in the preamble. But even if this be so, it may well be that, irrespective altogether of the preamble, the

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operative part of the Act creates a system of responsible government. If it does, then the principles or canons of construction to which I have referred apply to the existence and working of the system so created, but no further. In other words, I am only at liberty to regard as incorporated in the Act, though not expressed, [419] all such powers as may be necessary to the existence and working of that system, and without which the system so created could have no vitality. But there may be infinite varieties and infinite degrees of responsible government, and powers which may well be necessary to the existence, or working, or vitality of one system may not be so as to another. We, therefore, find ourselves continually and on all sides driven back to this central point, what is the measure of government which has passed to us under our deed of grant (if I may so call it)? With what limitations is it surrounded? What powers are conveyed to us, and what not? I am of opinion that a system or a measure of responsible government is created by the Act. This I think may fairly be inferred from the somewhat loosely worded provision in the latter part of sect. 37, "with the exception of the appointments of the officers liable to retire from office on political grounds, which appointments shall be vested in the Governor alone." This evidently relates to the appointment of ministers of the Crown in and for the colony of Victoria, or, in other words, to the appointment of the Governor's responsible advisers. But to say that an isolated expression of this kind gives to this colony the same rights and powers in regard to all colonial and local affairs, and applicable thereto, as the British Government possesses in regard to the affairs of Great Britain, is the enunciation of a proposition which is not only startling but positively unintelligible to me. We have certain powers, privileges, and rights expressly granted to us by the Act, and, mindful of the principles of construction applicable to an Act of this description, those powers, privileges, and rights so expressly granted carry with them all such other implied powers as are necessary to the existence, enjoyment, and use of those powers, rights and privileges. But, as a lawyer, I protest against abusing these grand and beneficial principles to the extent of using them to create and call into existence a primary power, or to supplement or aid that which has no existence. Under the Constitution Act we are at first authorized to establish two Legislative Houses instead of one (sect. 1), that being, as I would again observe, the primary object of the Act as expressed in the preamble; and also, by the same section, power is given to both Houses to make laws conjointly in and for Victoria, subject to Her Majesty's assent. Then by sect. 28, the

[420] Governor (this expression by sect. 62 meaning the person for the time being lawfully administering the government of Victoria, the word "alone," and the words "with the advice of the Executive Council," both of which expressions are found in another part of the Act, being omitted) is to convoke and prorogue both the Council and the Assembly, and to dissolve the Assembly. By sect. 35 power is given to the Legislature of Victoria to define its privileges, powers, and immunities within a certain limit. By sect. 36 it shall be lawful for the Governor to send back to the Council or Assembly for consideration any amendment which he may desire to be made in any Bill presented to him for Her Majesty's assent. Then comes sect. 37, by which power is given to "the Governor, with the advice of his Executive Council," to appoint to public offices, excepting ministers of the Crown, whose appointments are vested in the "Governor alone." By sect. 43 power is given to impose and levy duties of customs. Then come sections relating to the handing over all revenues of the Crown to the colony, and to the charging such revenues with payment of the civil list, &c. By sect. 54 power is given to Parliament to make laws for regulating the sale, disposal, letting, and occupation of waste lands of the Crown, and of all mines and minerals therein. By sect. 55, power to appropriate the consolidated revenue. Then comes the well known and much debated sects. 56 and 57, by which it is provided that all Bills for appropriating any part of the revenue, and for imposing any duty, rate, tax, rent, return, or impost, shall originate in the Assembly, and may be rejected, but not altered, by the council, and that no such Bill shall be originated in the Assembly which shall not have been first recommended by a message of "the Governor" to the Assembly. By sect. 60 power is given to Parliament to repeal, alter, or vary the Act, subject to certain limitations and conditions, and by sect. 61 power is given to the Legislature to alter the electoral Act. I have now, I think, generally and briefly enumerated nearly all, if not all, the powers, rights and privileges which are expressed as passing under the Constitution Act, and I at once admit that all other powers, which though not expressed, are necessary to the existence, working, or functional life of the expressed powers, pass with them, but none others. Now, how can it be said that the power or right to exclude [421] aliens from our territory is in any sense necessary to the exercise, enjoyment, or use of any of the powers, rights, or privileges expressed to be granted? It might be urged with far greater force that the exercise of the prerogative of mercy is appurtenant, or incident to, or inherent in the powers vested by the Constitution

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Act. And yet I venture to think that the exercise of the prerogative of mercy does not pass to us under that Act. Whether it was purposely withheld or not is another matter. But, in my opinion, we have it not, as a part of our system of government, so far as the Constitution Act is concerned ; and, except in so far as this power can be exercised here by virtue of sects. 318 and 319 of the Criminal Law and Practice Statute, 1864, and under the Governor's instructions, in every case calling for its exercise, recourse must be had to the Sovereign, through the Sovereign's Imperial advisers. But, as it happens, this prerogative may be exercised here, not by any law in force in Victoria, except in so far as it may be exercised by virtue of sects. 318 and 319 of the Criminal Law and Practice Statute, but by the instructions to the Governor as an Imperial officer. In the same way as I have directed attention to the expressions in the Constitution Act, "the Governor," "the Governor alone," "the Governor with the advice of his Executive Council," and to the interpretation section (62), I desire here to call attention to the peculiar and significant phraseology used in sects. 318 and 319 of the Criminal Law and Practice Statute. By sect. 318 "the Governor" may grant a conditional remission of sentence, and "the Governor in Council" may make rules for the mitigation or remission, conditional or otherwise, of sentences, as an incentive to good conduct while undergoing sentence. By sect. 319 "the Governor" may extend mercy conditionally to an offender under sentence of death. The Governor's instructions upon this point read as follows :—"The Governor shall not pardon or reprieve any such offender (an offender under sentence of death) unless it shall appear to him expedient so to do upon receiving the advice of the Executive Council. But in all cases he is to decide either to extend or to withhold a pardon or reprieve according to *his own deliberate judgment, whether the members of the Executive Council concur therein or otherwise.*" It would appear, therefore, that there [422] is a portion of the prerogative of mercy vested in the Governor and not in the Governor-in-Council by the Criminal Law and Practice Statute, and that there is an authority given to the Governor, as an Imperial agent of his Imperial principal, by the instructions, as to its further and fuller exercise. But there is no mention whatever of the exercise of such a power in the Constitution Act, and unless it can be dragged into the Constitution Act by one or other of the two principles to which I have already referred, it is not contained in that Act at all. For the reasons I have previously stated, this power cannot be created by calling in aid those principles ; and if this power, the power to extend mercy,

cannot be so created, most assuredly the power claimed to exclude aliens cannot. But the third maxim to which I have referred, and which I have suggested should be used with caution in construing an Act of this description, *expressio unius est exclusio alterius*, cannot and should not be discarded in the consideration of the question as to whether we get under the Constitution Act either the one or the other of the powers to which I have referred. The Act is absolutely silent as to a conveyance or grant of either of these powers, and yet it does convey to us in express terms powers of certainly no greater magnitude. I have already enumerated what those powers, rights and privileges are ; but as somewhat *eiusdem generis* with those that I have mentioned as not passing I may mention the power to convoke, prorogue and dissolve Parliament, sect. 28, and the power to alienate Crown land and Crown minerals, sect. 54. These form the subject of express grant, and of course any powers or rights necessary to the exercise of those powers pass with the grant of them ; but as regards the power of excluding aliens and of extending mercy, there is not even the faintest suggestion in the Act. Therefore, for this and for the other reasons to which I have referred, I arrive at the conclusion that under the Constitution Act we do not possess the power which forms the principal subject matter of the defence now under consideration. It is a power which possibly may have been withheld for the reason that its exercise here might cause complications between the Imperial Government and other nationalities. Being withheld it leaves us in this most unpleasant and invidious position, that we [423] are at present without the *legal* means of preventing the scum or desperadoes of alien nationalities from landing on our territory whenever it may suit them to come here. For the reasons I have given, judgment, in my opinion, should upon this argument be entered for the plaintiff.

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In this case we have to decide the questions of law raised by the pleadings which are contained in the fourth paragraph of the defence, and in a condensed form may be reduced to two, namely, first, whether, under the circumstances set forth in that paragraph, Her Majesty's ministers for Victoria could, on behalf of Her Majesty, lawfully exercise a right to exclude the plaintiff, an alien friend, from Victoria, as a part of the Royal prerogative ; and secondly, whether the act of preventing the plaintiff from landing in Victoria under those circumstances was an act of state policy, lawfully ratified by Her Majesty's ministers for Victoria on behalf of Her Majesty, or, shortly, an act of state ?



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Each of these questions, it is obvious, may involve the discussion of several propositions. The fact of the plaintiff having arrived in Victorian waters on board a vessel which carried immigrants in excess of the proper number has only been introduced into the defence as a circumstance on which to found an argument in discussing those propositions.

Now, as to the first question, nobody has disputed the Attorney-General's proposition that, by international law, every nation has the right of excluding foreigners from its territory, as well friends as enemies. But what we have here in the first place to consider is, by whom, according to English law, that right may be exercised as regards alien friends in the mother country, whether by the Crown or by Parliament. On this point the result of all the precedents and historical passages that have been cited to us may be very briefly summarized. The power to exclude aliens in time of peace, both by forbidding them to enter and by compelling them to depart the realm, has been claimed for the Crown as part of its prerogative down to quite modern times. Between the conquest and the end of the sixteenth century, as we are informed by learned writers, it was exercised not unfrequently, although only one well authenticated instance was mentioned to us, the expulsion of the Jews by King Edward the First; a somewhat unfortunate [424] instance, considering the feelings by which the whole population, from the highest to the lowest, were then animated towards the Jews. On the other hand, it appears that since the reign of Queen Elizabeth this power has never been exercised by the Sovereign without the sanction of Parliament, unless the case of *In re Adam* (1) furnishes a solitary exception to my statement. In that case Mr. Adam, an alien friend, had been banished from the island of Mauritius by order of the Governor and Council under instructions from the British Government, and it was held by the Judicial Committee of the Privy Council that, by the law of the island, an alien friend could be removed by the executive government at its pleasure without having been convicted of any offence, unless he had procured the permission of the government to establish his domicile there. The judgment of the Privy Council proceeded, to use the words of Lord Brougham, "on the ground of the peculiar provisions of the French law," which prevailed on the island, and would have been just the reverse if English law had prevailed there. According to the law of France as it then stood in the island, the executive government had power to remove any alien not domiciled by its authority, and for this reason

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(1) 1 Moo. P. C. 460.

it was resolved that Mr. Adam could be lawfully deported. He was not removed by force, but went away under pain of being forcibly deported, which was the same thing. French prerogative, however, was not English prerogative, and the case of *In re Adam* (1) furnishes no precedent for ascribing to an English Sovereign a power which had been inherent in the Crown of France, and was still existent in the Mauritius as governed by French law. The judgment, in my opinion, points to a directly opposite conclusion. To put it in another form, the offence which the foreigner had committed by entering the island illegally could, by the French law of the island, be punished by the Sovereign or his delegate by deporting the foreigner. But according to English law no resident in the United Kingdom, whether native or foreigner, can be deported at the arbitrary will of the executive for any offence alleged against him. For any offence he must be tried, and if convicted punished as the law prescribes.

That the power of excluding alien friends ever existed as a part of the prerogative has been vehemently denied by statesmen and [425] jurists of high authority quite as illustrious as the advocates for its existence. To one class of foreigners, namely, merchants, both in the Magna Carta of King John and in that of the first year of Henry the Third (A.D. 1215 and 1216), free right of ingress and egress, and of abiding and travelling from place to place in England, except in time of war, is accorded as one of the ancient and lawful usages of the realm. Probably this class of aliens was specially mentioned as the only one that specially needed protection, foreign merchants having suffered so much from King John's exactions, but that is only conjecture. In the charter of the following year a reservation is introduced, which rather countenances the authority of the Sovereign to deprive even merchants on occasion of the benefit of this old and excellent usage. The merchants are declared free to come and go "nisi publice ante prohibiti fuerint" (unless they shall have been publicly prohibited beforehand). On a question of this kind I attach comparatively little importance to what was done or said before the close of the sixteenth century. Up to that time constitutional usage was quite uncrystallized, in fact, it had hardly begun to settle. Before then hundreds of precedents might be found, stretches of Royal authority unchallenged at the time, for acts which were afterwards discovered to be gross infringements of the privileges of Parliament or of the liberties of the people. But I am very much impressed with the fact that for nearly three centuries no British Sovereign has attempted to exercise the right of expelling aliens or of pre-

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venting their intrusion in time of peace by virtue of his prerogative, and no British Minister, not even the strongest advocate in theory for the plenitude of the Royal authority, has ventured in this matter to reduce his theory into practice. Whenever it has been found necessary to take measures of precaution with respect to aliens resident in the country or expected to arrive, a temporary Act of Parliament has been passed for the purpose. The Acts of 33 Geo. III., c. 4, and 56 Geo. III., c. 86, to which allusion has been made, are examples, and the Act 11 & 12 Vict., c. 20, is another example. The Attorney-General argued that these two statutes of George the Third recognised the right of the Sovereign to exclude alien friends, and he referred particularly to the 7th section of the Act 33 Geo. III., c. 4, contrasting it with sect. 18. [426] Sect. 7, abbreviated, enacts that whenever His Majesty shall think fit, for the safety of the kingdom, to direct that aliens other than merchants shall not be landed in the kingdom or only landed at prescribed places, the master of any ship disobeying His Majesty's orders shall forfeit 50*l.* for every alien landed in contravention of it. Sect. 18, abbreviated, enacts that it shall be lawful for His Majesty to direct aliens, with certain specified exceptions, when resident in the country, to reside in such district as His Majesty shall think proper. The suggested contrast rests in this, that in the one case disobedience to the direction of His Majesty is made punishable, and in the other that His Majesty is empowered to direct. Sect. 15, which contains, with respect to ordering the departure of aliens, provisions similar to those of sect. 7, with respect to prohibiting their intrusion, supports the Attorney-General's argument. The enactments of sects. 7 and 15 are so framed that they would have been equally efficacious, even though without them His Majesty could not lawfully have directed that any alien should be kept out or expelled; but I believe, nevertheless, that the statesmen under whose auspices the Alien Acts of George the Third were passed did intend to recognise, so far as they could without distinctly affirming it, the prerogative of the Crown to exclude aliens from the United Kingdom, and that was the least that could have been expected from their openly expressed opinions. If, however, the Acts of George the Third recognise this power in the Crown, the Act cap. 20 of 11 & 12 Victoria does not, but the reverse. The first section of that statute authorizes a Secretary of State in Great Britain, or the Lord Lieutenant in Ireland, if he thinks it expedient, on certain information supplied to him, to direct, by order under his hand, that any alien, with the exceptions mentioned in sect. 6, shall depart the realm within a

limited time, and the Act then proceeds to find means for enforcing the order. If the Crown had been supposed to possess the right claimed for it, either as to aliens in general or as to aliens other than merchants, the power conferred by the first section of 11 & 12 Vict., c. 20, would have been wholly or partially unnecessary, and the section would have been framed in more guarded language, so as not to invade the prerogative. Upon the whole, I think that the right of excluding alien friends from the United Kingdom is now vested in the Parliament of the United Kingdom, and not in [427] the Sovereign alone. I cannot say that, as a part of the prerogative, it has fallen into desuetude, for that would imply that it once legally existed as such ; but, leaving its legal existence open to question, constitutional usage, hardening with time, has excluded it from the prerogative. Just the same thing was decided by the House of Lords when Sir James Parke was created a life peer by the title of Baron Wensleydale. It was established beyond dispute that the Sovereign had in former times created life peers, who by virtue of their creation assumed to sit and sat in the House of Lords. But it was resolved, nevertheless, that, although the Crown could still create life peers, it could not entitle any person so ennobled to sit in a chamber of hereditary legislators, which by constitutional usage extending over four centuries the House of Lords had become.

Suppose now, to adopt the language of the Attorney General, that the sovereign right which every nation possesses to interfere with foreigners entering its dominions is under the English constitution vested in the Queen. He then contends that, as regards local affairs, this branch of the prerogative is exercisable by the Queen's ministers for Victoria ; and he works out his conception in this way. The Queen's prerogative, he says, is active all over her Empire. Personally she cannot exercise this branch of it anywhere. Ergo, it must be exercised on her behalf in or for Victoria either by her ministers for Imperial affairs or by her ministers for Victoria. But responsible government has been established in Victoria, with ministers responsible as to all local affairs ; and thence it results that the right to advise the Queen as to such affairs has been taken away from the Imperial advisers of the Crown (that is, from Her Majesty's ministers in the United Kingdom), and has been transferred by law to her ministers in and for Victoria. The exclusion of foreigners from Victoria, although it may involve Imperial consequences, is a local affair, inasmuch as the power to exclude them is necessary for the good government of the colony. The Queen must therefore exercise this part of the prerogative

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through her responsible ministers in the colony, either apart from the Governor, or by the Governor, as the local repository of it. It must be assumed that the Queen or the Governor, as the case may [428] require, has assented to what has been ordered by Her Majesty's ministers for the colony on her behalf, inasmuch as they have not been dismissed from office. I have pieced together different portions of the Attorney-General's address, but I think I have rendered his argument faithfully, and as nearly as possible in his own words. Speaking with great respect, the argument appears to me very subtle, but unsound.

At the outset, we must not be misled by abstract terms. No such thing as responsible government has been bestowed upon the colony by name, and it could not be so bestowed. There is no cut and dried institution called responsible government, identical in all countries where it exists. Whatever measure of self-government has been imparted to the colony, we must search for it in the statute law, and collect and consolidate it as best we may. Nobody can have studied the development of self-government in the Australian colonies without having observed the tentative and cautious manner in which the British statesmen have proceeded in their arduous task. The impulse which has warmed them into action has always been supplied from the colonies themselves. But we must not forget this, that it is the Parliament of the United Kingdom, guided by the statesmen of the mother country, that has granted to this colony the whole measure of the self-government which it possesses. It was the Parliament of the United Kingdom which authorized Her Majesty to give the Royal assent to the Constitution Act, and it is the intention of the Parliament of the United Kingdom, as disclosed in the Constitution Act of which it approved, that we must set ourselves to discover.

By the laws which the Constitution Act preserved in force, and by others which have since been passed by the Legislature of this colony, and assented to by the Crown, the Governor has been authorized or commanded, either alone, or more usually with the advice of his Executive Council, to discharge a great number of duties, involving a wide administrative control. Admitting that all the incidents to that administrative control, by which I mean everything that is necessary for the use of the specific powers and faculties conferred, may be implied as given in with them, we are still driven back to the starting point, What are those specific powers and faculties? The power of excluding aliens is not one of them.

[429] By the Constitution Act itself certain powers are conferred upon the Governor similar to some of those which in the United

Kingdom the Queen enjoys as her exclusive privilege, notably that of proroguing the Council and Assembly and dissolving the Assembly, that of appointing any officers liable to retire on political grounds, and that of appointing, with the advice of the Executive Council, all other public officers under the government of Victoria. Powers of this class having been bestowed in express terms, we ought to presume, according to the ordinary rule of construction, that no others of the same class were intended to pass. The rule is not one of universal application, but in the present instance it should be rigidly applied, inasmuch as it is still a fundamental maxim that the Crown is not bound by any statute unless expressly therein named, and, as a corollary, the Royal prerogative cannot be touched except in so far as therein expressed. It is, moreover, conceded that the exclusion of aliens is not a local affair in its consequences, which might affect the whole empire; and that circumstance furnishes an additional reason for not implying an intention on the part of the Home Parliament to vest in the Governor a power which his advisers here might recommend him to execute in a manner detrimental to Imperial interests. Except in so far as his position has been altered by positive enactment of the Home Parliament, or by some statute passed here and assented to by Her Majesty, the Governor himself is the servant of the Crown, tied down by his commission and instructions. It is not pretended that he has been permitted by either to shut out or to remove aliens; and if no such authority has been distinctly vested in him by statute, or delegated to him by the Queen, we may safely conclude that he does not possess it.

But then it has been argued, as I have already stated, that if the right of excluding alien friends from Victoria as part of the prerogative still resides in Her Majesty, and has not been vested in or delegated to the Governor, Her Majesty's ministers for this colony, passing by the Governor, can exercise it directly on her behalf, and must be deemed to have exercised it with her sanction, unless they are dismissed. I have not the slightest hesitation in denying this proposition. What is claimed by the Attorney General for the [430] ministers of the Crown in Victoria, not in terms but in substance, is this, that if the prerogative as to excluding alien friends still exists, they can exercise it as regards this colony at their uncontrolled discretion. Even were they on the spot, able practically to consult with the Queen in person and so advise her, which they are not, yet, as she cannot dismiss them and appoint others, it would be perfectly immaterial whether she approved of what they did or not. The constitutional fiction that Her Majesty approves

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of what her ministers have done because she does not dismiss them, cannot apply to this case.

The practical application of the Attorney General's theory might lead to some curious results. The main purpose of the Constitution Act, as it is to be gathered from intrinsic evidence, was to constitute, in lieu of the Legislative Council then subsisting under the Act 13 & 14 Vict., c. 59. by which the district of Port Phillip had been erected into a separate colony, separate Legislative Houses, with enlarged authority and functions. The preamble recites that purpose, and no other. By the Constitution Act the Governor is not compelled to assent to any Bill on Her Majesty's behalf, and any Bill to which he gives his assent may, within a limited time, be disallowed by Her Majesty. Her veto cannot be contested, and when she exerts it she acts by the advice of her responsible ministers at home. (See 5 & 6 Vict., c. 76, ss. 31, 32, 33, and 40 ; 7 & 8 Vict., c. 74, s. 7 ; 13 & 14 Vict., c. 59, ss. 12 and 32 ; 18 & 19 Vict., c. 55, s. 3.) As to the classes of Bills to which the Governor can only assent provisionally, their operation being suspended until the signification of Her Majesty's pleasure thereon, or to which he must absolutely refuse the Royal assent, he must be guided by the instructions which he receives from the Home Government. By his instructions the Governor is now explicitly prohibited from assenting to any Bill inconsistent with obligations imposed upon Her Majesty by treaty. Up to the present time the Legislature of this colony never could, and cannot now, pass into law any Bill inconsistent with obligations imposed upon Her Majesty by treaty, for the Governor cannot lawfully assent in Her Majesty's name to any such bill until his instructions are altered. I am speaking generally, and quite without reference to the treaties of Nan-king and Tien-Sing, of which I possess no [431] copy ; and I do not know what obligations are imposed upon Her Majesty by either of those treaties. But supposing any treaty now to subsist between the Crown and any foreign state, whereby Her Majesty is obliged to permit the subjects of such state in time of peace to enter Victoria upon due observance of any conditions imposed upon their entry by any statute having legal force in Victoria, that treaty cannot be violated by colonial legislation. If ministers here can dispense with the Governor, and act directly on Her Majesty's behalf, and in fact against her will, they can, without resorting to legislation, lawfully break in her name a treaty which the colonial Parliament has been restrained from breaking.

I come now to the second question, whether the defendant's act in preventing the plaintiff from landing was an act of state ? It is

admitted of course that his act was approved of by the Minister of Customs and his colleagues. This second question is quite distinct from the first, although partly depending on similar arguments. An act of state, according to Mr. Justice Stephen's definition, is some act injurious (by which I understand him to mean "hurtful," and not necessarily "wrongful,") to the person or property of some one who is not at the time a subject of Her Majesty, and which has been done by a representative of Her Majesty's authority, civil or military, and has been sanctioned by Her Majesty either by prior command or by subsequent ratification. If an action is brought by a foreigner in an English court for an alleged wrong, and it is proved that the act complained of is an act of state, the court is deprived of jurisdiction to inquire into its legality, although the same act, if done to a British subject, might have given him a clear right of action. It is disputable whether an act of this description can be committed within Her Majesty's dominions. Mr. Justice Stephen thinks that it can. But at any rate it is essential to its character that it should be committed against one who is not at the time a British subject, and that it should be sanctioned by Her Majesty as head of the State, representing it in its relations with foreign powers. The Attorney General contended that the exclusion of aliens from Victoria was a local matter, and that Her Majesty's ministers for the colony were entitled to advise Her Majesty with regard to local matters, and that, as they had sanctioned the act, she must be supposed to have known of it and sanctioned it also. But from its very nature, [431] an act of state, in whatever place it may be done, must be an act of Imperial concern, of which the immediate consequences may fall upon the whole empire. The wrong having been sanctioned by the Sovereign, or by the body in whom resides the supreme authority with regard to international relations, has been done by the State itself, and can only be redressed by war if the State declines to afford satisfaction.

With respect to such an act, Her Majesty's Home ministers alone can advise her; her ministers for Victoria cannot. directly or indirectly; and necessarily, therefore, their knowledge cannot be accepted as her knowledge, nor their sanction as her sanction. How can Her Majesty sanction an act of state for Victoria, and repudiate it for the rest of the empire; and if she cannot repudiate it for the rest of the empire, how can it be called local to Victoria? Victoria is not a state by herself, she is only a component part of a great empire.

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Before quitting this branch of the subject. I would advert to the case of *Buron v. Denman* (1), cited as establishing as a conclusion of law that when the knowledge of ministers is proved, the knowledge of the Crown must be assumed. The action was tried at bar, and Parke, B., summing up for the Court, told the jury that if the Crown, with knowledge of what had been done, ratified the defendant's act by the Secretary of State or the Lords of the Admiralty, the action could not be maintained. From his summing up as reported, but which may have been abridged in the report, he must, as it appears to me, have directed the jury, not that they were obliged, but that they were at liberty to infer the Crown's knowledge of the act from the evidence of its having been known to and approved by two Secretaries of State and the Lords of the Admiralty, who, in the due discharge of their duty, would communicate it to the Sovereign; and the jury found that the Crown knew of the act. If the effect of the summing up in *Buron v. Denman* (1) is what I understand it to be, then, notwithstanding that the knowledge of ministers has been conclusively proved, or has been admitted, evidence might be received to shew that the Crown did not in fact possess that knowledge. It is not therefore a conclusion of law that her ministers' ratification is Her Majesty's ratification. It is only a presumption liable to be rebutted.

[433] My judgment in this case is not affected by the legality or illegality of the presence of the plaintiff in the port of Melbourne. But as the point has been debated, and the judgment of others may be affected by it, I desire to express my views upon the construction of the Chinese Act, 1881. There can be no mistake about the object of the Legislature in passing that Act. They desired to diminish the influx of Chinese immigrants into this colony, and this object they endeavour to accomplish in two ways. In the first place they limited the number of Chinese that might be carried on board any vessel into any port in Victoria in proportion to the tonnage of the vessel, allowing one immigrant only to every 100 tons. Secondly, they imposed on all Chinese immigrants arriving in any vessel from parts beyond Victoria, and desiring to land at any port or place in the colony, a poll tax of £10, to be paid by the master of the vessel to the proper officer of customs before permitting the immigrant to land, or making any entry at the customs. Breaches of both these enactments are punishable in the manner which the Act prescribes; but there is a significant and designed distinction between the two in respect of

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(1) 2 Fx. 167.

the persons on whom the liability for a breach is cast. The master of any vessel permitting any immigrant to land or escape from his vessel at any port in Victoria before payment of the poll-tax is liable to a penalty of £50 for each offence in addition to the amount of the tax. Any immigrant attempting to evade the tax is liable to a penalty of £10, or, in default, to twelve months' imprisonment unless the penalty be sooner paid. On the other hand, for every immigrant imported in excess of the tonnage limitation, the owner, master, or charterer of the vessel is liable to a penalty of £100; but the immigrant, who is powerless to prevent either owner, master, or charterer from violating the law, is not liable to any penalty. The master who permits a Chinaman to evade the poll-tax, and the Chinaman who evades the tax, are equally offenders against the law. When a master brings into port more immigrants than the law allows, he is also an offender, but the Chinese immigrants in such a case are innocent passengers and not offenders. They are legally here, so far as they are concerned, although they may have been illegally brought here by others. If the poll-tax be paid, or [434] legally tendered (for legal tender, when refused, is equivalent to payment), the Act permits the Chinese immigrant to land, and his landing is lawful, there being no other legal force arising either out of prerogative or statute to restrain him. My judgment is for the plaintiff.

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A'BECKETT, J. :—

Having had the advantage of reading the judgment of my brother Holroyd, and agreeing with him that the right to exclude aliens is not exercisable in this country, and that their exclusion in the instance before us cannot be defended as an act of state, I think it unnecessary to repeat at length the reasons for coming to these conclusions, or to refer in detail to the Acts of Parliament and other documents already noticed by which they are supported. I confine my judgment to these two points, as they are sufficient for the judgment of the case, and I will briefly state the grounds on which I proceed. Assuming that the right to exclude aliens subsisted in England as part of the Royal prerogative when our Constitution Act was passed, I can find nothing in the Act, or in the system of government which it originated, authorizing the exercise of this right by the advice of ministers in Victoria. It was argued that the authority must be given because responsible government was given, as if the phrase "responsible government" had a definite comprehensive meaning, necessarily including the power in question. The phrase has to my mind no such force. Respon-



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sibility may attach to persons having powers strictly limited, and its existence does not indicate the extent of the authority from which it arises. For this we must look to the terms in which the authority was conferred, that is to say, to the Act of Parliament establishing the system, and to the documents delegating powers to the Governor who administers it, to ascertain whether by express words or necessary implication the right to exclude aliens has been given. This is a question of legal construction in which we cannot be assisted by the speeches or despatches of statesmen, and, considered in this aspect, there seems to me to be little difficulty in answering it in the negative. The power is not expressly delegated, and the delegation of a power which might seriously disturb foreign relations with which we were not intended to interfere cannot reasonably be inferred. Treating this right of exclusion as a [435] branch of the prerogative, unless it has been delegated to the representative of the Crown in Victoria, it is a matter on which it would be useless for ministers in Victoria to tender him advice, and they cannot advise Her Majesty directly as to its exercise. Certainly they cannot exercise the prerogative for themselves. The implication of assent by the Crown from their continuance in office can only arise as to acts which ministers can lawfully do as such. If they assume to exercise powers which are not vested in them there can be no legal implication of Royal assent. If ministers, for instance, had engaged the Victorian navy in a war of their own making, the court would not assume assent to this war by the Queen or by the Governor from the fact that they continued in office. The conclusion that the government of Victoria has not the right to exclude friendly aliens in time of peace seems to me to dispose of the defence that the act complained of was an act of state, and therefore not actionable by an alien, on the grounds set forth in the case of *Buron v. Denman* (1). An act of state must be something which it is competent for the state to do. In the case of a Sovereign State, no question as to its competency can arise, but it is otherwise with a government entrusted with only limited powers such as our own, and we have to consider whether the thing done was within its powers. If something done within its powers inflicted injury upon an alien, its being an act of state might debar him from redress in our court, although conditions to the proper doing of the thing had not been observed, but where the court sees that the thing done was not within the powers of the government under any conditions, it cannot be regarded as an act of state.

For these reasons I think the plaintiff entitled to judgment.

WRENFORDSLEY, J. :—

Following the five judgments which have just been given by their Honours, I propose to confine the observations which I am left to make to the two questions of constitutional law, which appear to me to form the only grounds for decision in this case. The facts, so far as they are material, can be very briefly stated, and I desire to refer to them. The plaintiff was an immigrant on board the British ship *Afghan*, a vessel trading between Hong Kong and certain ports in the Australian Colonies. In the month of April last (1888) she [436] arrived within the port of Melbourne, and she brought 268 Chinese to this colony. By the local Act of 1865 and the amending Act of 1881 the entry of Chinese had been made the subject of special legislation, and in fact the *Afghan* brought 254 Chinese in excess of the tonnage allowance permitted to her under the local Acts. On the arrival of the ship at the port of destination, the defendant, in his official character as Collector of Customs, and acting, as it is said, under the sanction of the government, refused to allow any of the Chinese to land, and this action has been brought against the defendant to recover damages by reason of that refusal. The fourth plea sets forth the further facts very fully. It states that the plaintiff was, at the time of the committing of the grievances in the statement of claim mentioned, a subject of the Emperor of China, and owed allegiance to him, and was not a British subject, etc. That previous to the arrival of the ship, the defendant had received instructions from the Commissioner of Trade and Customs, as and being the responsible Minister of the Crown for the Colony of Victoria, charged and entrusted with the administration of the laws of the said colony relating to the customs and immigration; that there was an apprehension on the part of Her Majesty's Government for the said colony that a large influx of Chinese into the said colony was imminent; and that, in the opinion of the said minister of the said government, such influx would be a danger and a menace to the said colony, and to the public peace thereof, and to Her Majesty's subjects residing therein, and would be in a high degree detrimental to their interests; and that, in the opinion of the said minister and Her Majesty's said government, it was for the advantage of the said subjects so residing in the said colony that the said influx should be prevented, and no further Chinese other than such as are British subjects should be allowed to enter the said colony, etc. That the defendant, in obedience to such instructions and determination as such officer of Her Majesty's Customs as thereinbefore mentioned by command of our Lady the Queen, refused to permit the plaintiff to

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land in the said Colony of Victoria, and hindered and prevented him from so landing, and wholly declined and refused to receive the sum of 10*l.* mentioned in the first paragraph of the statement of claim, etc. That his said acts, etc., were by him subsequently [437] reported and communicated to Her Majesty's said responsible minister, and were by him and by Her Majesty's said government ratified and approved of as being acts of state policy.

It was admitted at the bar that the acts complained of had not been ratified by any order of council, or by any sanction of the Governor. In considering the effect of this plea, it is required that we should ascertain what is the actual status of the Government of Victoria. It has been submitted on the part of the defendant that the acts in question were done by Her Majesty's responsible ministers for Victoria, and that the prerogative right now vested in the Crown to keep out aliens applies. It is not necessary to discuss the question, raised on behalf of the plaintiff, that if such a prerogative right was at any time vested in the Crown it has become obsolete. Speaking for myself I am of opinion that the prerogative right of the Crown to keep out aliens does exist, although its exercise may, by the custom or legislative action of modern times, be subject to the control of Imperial ministerial responsibility.

I now proceed to consider to what extent the general prerogative rights of the Crown have been either granted or lessened by the Act of Constitution. I am not aware of any authority to the effect that, in a settled colony like Victoria, the Act of Constitution carries with it powers outside or beyond the exact terms of the grant itself.

Victoria is a colony by settlement, and it is common knowledge that the settlers brought with them so much of the law of England as could be made applicable to local conditions.

In respect of all further privileges, there is ample authority for saying that we must see what are the privileges bestowed by the grant or charter of government.

The Imperial Act 18 & 19 Vict., c. 55, enabled Her Majesty to assent to a bill amended by the Legislature of Victoria to establish a constitution in and for the Colony of Victoria. The preamble refers to the 13 & 14 Victoria, c. 59, which was an Act for the better government of Her Majesty's Australian Colonies. By that Act Victoria became, for the first time, a separate colony. The preamble states that it was expedient that the district of Port Phillip, then part of the Colony of New South Wales, should be erected into a separate colony, and that further provision should be

[438] made for the government of Her Majesty's Australian Colonies. The Act of Constitution is the local Act of 19 Vict. It was assented to by Her Majesty in Council (pursuant to the provisions of the Imperial Statute 18 & 19 Vict., c. 55) on the 21st July, 1855, and came into operation on the 23rd November, 1855. It was included in the Imperial Act as Schedule 1.

The Imperial Act was accompanied by a despatch from Lord John Russell, who was then Secretary of State for the Colonies, dated 20th July, 1855, and although the Act of Constitution to which he refers must be held to speak for itself, it is nevertheless useful to see what opinion was then expressed by that very constitutional minister, when, as the head of the colonial office department, he assisted as a Secretary of State to give this colony a separate and constitutional existence. "No alteration," he says, "has been made in any of the provisions which are simply of a local character." He adds,— "It has been the conviction of Parliament that the Legislature must itself be trusted for all the details of local representation. But the responsibility for its introduction will rest, as it ought to do, with the members of the council by whom it was in all substantial points prepared and discussed." The Secretary of State then proceeds to deal separately with the proposals which appear to refer to the rights of the Crown. "But those portions of the provincial enactment which controlled and regulated the future power of the Crown as to the reservation and disallowance of colonial Acts, and as to the instructions to be given to Governors respecting them, have been omitted by Parliament. Those portions were clearly not of a local character, but regarded the connection of the colony with the body of the empire." These are very marked words. In the first place, he speaks of the provincial enactment, as distinguished from an Act of the Imperial Parliament. Next, he refers to the instructions to be given to Governors, and then he points to the connection of the colony with the body of the empire. I do not see how that connection, at all events in respect of external relations, could be maintained without a strict reservation of all Imperial or Crown rights.

The despatch included an intimation to the effect that the Governor would receive a fresh commission and instructions, amended in [439] certain particulars, which the system of government then introduced rendered it necessary to change. I have endeavoured to consider very carefully the several powers and provisions conferred by the Act of Constitution, and I fail to see that they go further than to provide for a perfect scheme of local government, limited to its internal relations. When I say a perfect scheme, I

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mean a system of responsible self-government, complete within itself, so far as representative institutions of a popular character can be said to be perfect. All the privileges of Parliament were to be defined, and all enabling powers incident to such a form of government were conferred. I do not see, however, that by any rule of construction the rights so given can be extended. On the contrary, the responsibility which was to be attached to the formation of the body which was to represent the executive power applicable to such a form of Legislature was left to the responsible council for the time being, and such a responsibility or such a power could not have included a discretion to deal with the external relations of the newly formed community. I think that the then existing circumstances of the colony precluded the exercise of such an extraordinary power, seeing that the development of such a grant of local government must have required at the time that protection from all foreign influences which could only be obtained by the due reservation of prerogative rights.

It seems to me that the proper construction of the Act of Constitution is still further assisted by a reference to the amended instructions which have been issued to the Governor, and I refer more particularly to those which are now in force in this colony. But, before I refer to the exact terms of the instructions, I wish to point out what is the legal status of a Governor in a court of law. We must be careful not to confound what may be an expression of popular courtesy with a legal definition. Lord Brougham, in *Hill v. Bigge* (1), and which is cited in the comparatively recent case of *Musgrave v. Pulido* (2), says,—“If it be said that the Governor of a colony is quasi Sovereign, the answer is that he does not even represent the Sovereign generally, having only the functions delegated to him by the terms of his commission, and being only the officer to execute the specific powers with which that commission clothes him.”

[440] In order to meet an observation made in the course of the argument, I would add that, for the purpose of this decision, I deem a Governor to be an officer acting under express power from the Crown; and, certainly, in the case of a colony possessing representative institutions, he only represents the prerogative of the Crown in respect of those instances which are directly included in the terms of his commission, and I do not find any enabling words in the commission to justify any other conclusion. He is an accountable officer, to act according to such instructions as may from time to time be given to him. By paragraph 7 he may act in opposition

to the executive council, but subject to the obligation of reporting the grounds for so doing. Paragraph 9 is most applicable to this case, for he is not to give assent to any bill, the provisions of which shall appear inconsistent with obligations imposed on the Crown by treaty ; nor any bill of an extraordinary nature and importance, whereby the prerogative, or the rights of property of Her Majesty's subjects not residing in the colony, or the trade and shipping of the United Kingdom and its dependencies may be prejudiced. Then follows the power to use or exercise the prerogative right to pardon under the conditions which are mentioned. These expressions and exceptions suggest, as it seems to me, a clear and intended reservation of the rights of the Crown ; and certainly with respect to all external relations the power vested in the Crown is strictly preserved. If this view is incorrect, then I fail to see the substituted authority in which the prerogative right which is contended for in this case is now vested. As I have already intimated, I do not think it exists in Her Majesty's ministers in this colony under any form of grant conferred by the Act of Constitution ; nor can it be said to exist in the Governor, who, as I have said, is an officer duly appointed by the Crown, and on whom rests the obligation of reporting to the Secretary of State any breach which may occur either of his instructions or in the exercise of the Act of Constitution. This view is well supported by authority. Mr. Chitty, in his work on the Prerogative, at page 34 says :—"The Governor . . . is substantially a mere servant or deputy of the Crown, appointed by commission under the great seal. The criterion for his rules of conduct are the King's instructions under the sign manual." And so, with respect to the status of the colony, the same authority, at [441] page 32, proceeds to say, "In every question, therefore, which arises between the King and his colonies respecting the prerogative, the first consideration is the charter granted to the inhabitants. If that be silent on the subject it cannot be doubted but that the King's prerogatives in the colony are precisely those prerogatives which he may exercise in the mother country."

In the case of *In re The Lord Bishop of Natal* (1), Lord Westbury, as Lord Chancellor, said, "After a Colony or Settlement has received legislative institutions, the Crown (subject to the special provisions of any Act of Parliament) stands in the same relation to that Colony or Settlement as it does to the United Kingdom." Dwarris is also an authority on this subject. He says (page 909), "Comparatively few of the statutes passed in the colonies receive the direct confirmation of the King. It is clearly understood that

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(1) 3 Moo. P. C., N. S. 115, 148.



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so long as the prerogative is not exercised the Act continues in force under the qualified assent which is given by the Governor in the colony on behalf of the King."

I arrive, therefore, at the conclusion that the status of this colony is of a much more limited character than is suggested by the words of the plea. In describing it I adopt the language of Baron Parke, in *Kielley v. Carson* (1). That case had reference to the powers of a House of Assembly in a settled colony, and in the course of his judgment he said, "They are a local Legislature, with every power reasonably necessary for the proper exercise of their functions and duties, but they have not what they have erroneously supposed themselves to possess—the same exclusive privileges which the ancient law of England had annexed to the House of Parliament." And here I wish to repeat a question which I put once before during the progress of the arguments in this case. Let it be assumed that the Government of Victoria, in the exercise of the prerogative right which is claimed, did some act which ultimately proved to be against the comity of nations, and that the Imperial Government had to deal with it with diplomatic usage, and that an indemnity had to be paid. Who would pay it, this colony or the Imperial Government? I confess I see great difficulty of a practical nature, if the Government of this Colony is to be held free to act in respect of the high prerogative power which is claimed; or to be at liberty as a delegate of the Imperial Government, within the meaning of [442] the case of the *Secretary of State in Council of India v. Kamachee Boye Sahaba* (2), to pledge the Imperial Government to obligations of an international character. It seems to me, however, that, notwithstanding this view, there does exist in this colony a form of government, consistent with a full grant of representative institutions, limited, no doubt, in the application of prerogative rights, but possessing ample power with respect to all internal administration. I think it possesses the *droit public interne*, and I use the expression in order to distinguish its legislative powers from the *droit public externe*. In other words, this colony did not as a State receive any recognition from the Imperial Government with respect to its external relations, nor could such a recognition take place under its existing connection with the mother State; but I think that for the purpose of all necessary intercourse with other countries, the rights of the Crown have been sufficiently reserved. In saying this, I express no opinion with respect to the fitness of this limited view of its constitution and government to the obligations

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(1) 4 Moo. P. C. 63, 92.

(2) 13 Moo. P. C. 22.

which may arise from the emergencies which are incident to all forms of government.

I now wish to refer, very briefly, to the further question which has been raised by this plea, to the effect that the acts done amounted in law to an act of state. In the much altered condition of this colony since the Act of Constitution, I can well understand that circumstances might at any time justify the exceptional action which is involved in an act of state. Mr. Justice Stephen, in his work on the criminal law of England, thus defines an act of state : —“ It is an act injurious to the person, or to the property of some person, who is not at the time of that act a subject of Her Majesty, which is done by any representative of Her Majesty's authority, civil or military, and is either sanctioned or ratified by Her Majesty.” In view of the exceptional circumstances of this case, as set out in the plea, it may be that authority might be found to justify the action of the local government, supposing that the act of the government was a matter still existing for ratification by the Crown. I can understand many acts consistent with colonial policy which, although in a sense hostile to a foreign power, would nevertheless not be acts involving questions of peace or war. In saying this, [443] I refer to acts done against ill-doers as a class, and not to acts done as against a friendly State. I apprehend it would in such a case rest with that State to put its own interpretation on the meaning of the act complained of, as also to assert its own rights. And, with reference to the present case, such a State would doubtless take into consideration representations of a diplomatic character, which would have for their object to shew the exceptional position of this colony, its vastness and material prosperity, its distance from the parent State, its isolation from European concerns, and the remote application of Imperial treaties to its external relations. I can imagine circumstances happening when such representations would be useful to this colony, but I am of opinion that they could only be made by the Imperial Government. I need not, however, pursue this subject further, because the act in question has not been in any sense ratified or confirmed by any competent authority ; and it follows that, in my opinion, the plea, so far as it seeks to raise the constitutional question, has not been sustained.

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J.C.\*

## (PRIVY COUNCIL.)

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April 21, 24;  
June 17.

ASHBURY ..... *Defendant* ;

AND

ELLIS ..... *Plaintiff*.*On appeal from the Court of Appeal of New Zealand.*[*Reported* [1893] A.C. 339.]

*Law of New Zealand, 15 & 16 Vict. c. 72—Powers of Local  
Legislature—Proceedings against Absentees without service.*

*Held*, that 15 & 16 Vict. c. 72, on its true construction, empowers the Legislature of New Zealand to subject to its tribunals persons who are neither by themselves nor their agents present in the colony: —

*Held*, further, that a law of the local legislature authorizing the local courts in any case of contracts made or to be performed in the colony to decide whether they will or not proceed in the absence of the defendant is *intra vires* and reasonable.

Whether a judgment against an absentee without service of the writ will be enforced by the courts of another country is a matter for those courts to determine, and does not affect the validity of the local law.

APPEAL from an order of the Court of Appeal (Nov. 16, 1891), affirming an order of Williams, J. (June 23, 1891), in the Supreme Court (Otago and Southland District), in the matter of two actions brought in the Supreme Court by the respondent against the appellant, upon promissory notes for £5,435, purporting to have been made by the appellant through his agent Zimmer. In these actions

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\**Present* :—THE LORD CHANCELLOR, LORD WATSON, LORD HOBHOUSE, LORD MACNAGHTEN, LORD SHAND, and the HON. GEORGE DENMAN.

the respondent obtained leave to issue writs and proceed thereon without service against the appellant under rule 53 of the Civil Procedure Court (46 Vict. No. 22, 2nd schedule). The appellant applied to the Supreme Court to rescind that leave which both courts, as mentioned above, refused to do.

The appellant was domiciled in England. He was not at the time the actions were commenced present either in person or by agent in the colony, and had not been there since December, 1886, when he was there on a short [340] visit, and never had a permanent residence there. At the time the writs were issued he was resident in London. The facts are stated in the judgment of their Lordships.

Sir *Horace Davey*, Q.C., *Piggott*, and *Worsfold*, for the appellant, contended that the orders should be reversed, and the writs set aside with costs. The questions are, first, whether rule 53 has been rightly construed; second, whether if that construction be right, the rule is not pro tanto ultra vires the local legislature under the constitution of the colony; third, whether the court exercised a right discretion in making the orders. It was contended that rule 53 of the Code of Civil Procedure (46 Vict. No. 29, 2nd schedule) applies only to those defendants over whom the Supreme Court has properly jurisdiction and that the appellant was not such a person. Rules 48-51 applied to his case. If rule 53 applies to all defendants who are absent from the colony in the action specified therein, so that the appellant's case would fall within it, then the rule itself was to that extent beyond the powers of the legislature; for that legislature has no power except over its own subjects. Reference was made to 15 & 16 Vict., c. 72, the Act which created the legislature of New Zealand. The appellant not being subject to its authority by birth, and not being resident either by himself or his agent within its jurisdiction, and never having

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been either domiciled or resident in New Zealand, could not be subjected by it in his absence to its tribunals; and moreover foreign courts would not recognise judgments so obtained or proceed to enforce them. Reference was made to *Buchanan v. Rucker* (1); *Macleod v. Attorney-General for New South Wales* (2); *Russell v. Cambefort* (3); *Schibsby v. Westenholz* (4). With regard to the erroneous exercise of discretion, it was contended that an action was proceeding between the same parties in the English Courts in respect of certain other promissory notes, part of the same transaction, in which the issues to be determined are the same.

*Finlay*, Q.C., and *Reginald Brown*, for the respondent, were not heard.

[341] The judgment of their Lordships was delivered by

LORD HOBHOUSE:—

The main question argued in this case relates to the right of the New Zealand Legislature to authorize judicial proceedings against absentees. The rule of the New Zealand Code (46 Vict. No. 29) which has come under discussion is rule 53, one of a group of rules which fall under the head of "Proceeding without service." The material part of it is as follows:

"In actions founded on any contract made or entered into or wholly or in part to be performed within the colony, on proof that any defendant is absent from the colony at the time of the issuing of the writ, and that he is likely to continue absent, and that he has no attorney or agent in the colony known to the plaintiff who will accept service, the court may give leave to the plaintiff to issue a writ and proceed thereon without service."

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(1) East, 192.  
 (2) [1891] A.C. 455.

(3) 23 Q.B.D. 526.  
 (4) L.R. 6 Q.B. 155.

Then come a number of provisions relating to the conditions on which leave should be given, and to its incidents when given.

Another group of rules in the same code relates to service of process out of the colony. There seems to have been considerable discussion in the courts below whether Williams, J., who presided in the first court, should have acted under the last named set of rules rather than the first. But independently of the fact that, if there is jurisdiction, the matter is one of judicial discretion and not one arising on this appeal, the contention of the appellant is equally hostile to the validity of both groups of rules.

His broad contention is, that the Act of Parliament (15 & 16 Vict. c. 72) which gives to the Legislature of New Zealand power "to make laws for the peace, order and good government of New Zealand, provided that no such laws be repugnant to the laws of England" does not give it power to subject to its judicial tribunals persons who neither by themselves nor by agents are present in the colony. It is not contended that the rules in question are repugnant to the laws of England. In fact they are framed on principles adopted in England. But it is said [342] that the moment an attempt is made by New Zealand law to affect persons out of New Zealand, that moment the local limitations of the jurisdiction are exceeded, and the attempt is nugatory. This was put at the bar in so broad and abstract a way, that it might be sufficient for their Lordships to answer it by equally abstract propositions. But it will be more satisfactory to state the material facts which have raised the question.

The appellant, Mr. Ashbury, resides in England. In the year 1885 he went to New Zealand, and there on the 23rd of March of that year, made a written agreement with John Chute Ellis, the respondent's brother, for the purchase of a large tract of land. After answer-

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ing mortgages, the surplus purchase money, £38,440, was secured, as regards principal by twelve promissory notes payable in England, and as regards interest by twelve promissory notes payable at the bank of Australasia, in Invercargill, New Zealand. The latest notes are payable on the 20th of December, 1890. Some crops and stock were to be taken by Ashbury at valuations, and it is a term of the agreement that if, on the completion of the valuations, it is found that the balance of the purchase money is not correctly represented by the promissory notes, new ones shall be given.

In November, 1886, Ashbury was again in New Zealand. On the 4th of that month he addressed a letter to the bank of Australasia, requesting them to treat his agent John Jerome Zimmer, as empowered to draw, accept and indorse in his name bills of exchange and promissory notes. On the 26th of the same month he executed a deed appointing Zimmer his attorney for (amongst other things) managing his estates in New Zealand, and adjusting all accounts depending between him and any person whomsoever. Ashbury then left New Zealand, and has never been there again.

About this time Zimmer settled the valuations which were still pending between Ashbury and John Chute Ellis under the agreement of March, 1885. He paid a portion of the amount found due, and the rest he secured by nine promissory notes purporting to make Ashbury liable to pay to John Chute Ellis, at the bank of Australasia, Invercargill, various sums at various dates, the latest of which is the 20th of December, 1890. Two of the [343] notes bear date the 17th of September, 1886, and the other seven the 20th of September, 1886. Ashbury states that they were in fact given in February, 1887. They were paid into the bank by John Chute Ellis and Thomas Chute Ellis claims to be indorsee of them for value. They are the notes now sued on in two actions.

It seems that before any action was brought, Ashbury revoked Zimmer's agency, and remained without any agent in the colony.

In the earlier of the actions, founded on three of the notes, an order was made on the 18th of February, 1891, allowing the plaintiff, Thomas Chute Ellis, to proceed under rule 53 without service. In June the defendant Ashbury moved to rescind the order, or, in the alternative for leave to file a defence, and for postponement of the trial pending an application by him to take his evidence by commission in England. On the 23rd of June, 1891, Williams, J., refused the first part of the defendant's motion and granted the second. Precisely similar proceedings took place in the second action.

The defendant then moved the Court of Appeal to discharge the original orders giving the plaintiff leave to proceed without service, and to discharge the orders of the 23rd of June so far as they maintained the original orders. It was agreed that the arguments and judgments should apply to both actions. On the 19th of October, 1891, the Court dismissed the appeals with costs. From that decision the defendant obtained special leave to appeal to Her Majesty in Council.

So far as the decision turns on the precise nature of the case, it is not a very favourable case for denying the right of the New Zealand authorities to try the questions at issue between these parties. Zimmer, being certainly Ashbury's agent in New Zealand for some purposes, makes a contract purporting to bind his principal to the payment of money in New Zealand. This contract is itself the sequel of another contract by Ashbury for the purchase of land in New Zealand. Ashbury defends himself by contending that Zimmer held no agency empowering him to give the notes, and by alleging that he is in a position to rescind his earlier contract with John Chute Ellis; that he is suing in England for that pur-

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[344] pose ; that he will have counter claims to enforce against John Chute Ellis larger than the amount of the notes sued on ; and that the notes were indorsed to Thomas Chute Ellis under circumstances disentitling him to stand in any better position than John Chute Ellis. These defences may or may not be made good. They are the matters to be tried in these actions. Whether they can be better tried in England or in New Zealand we need not discuss. It is obvious that they concern rights that have accrued, and acts that have taken place, in New Zealand.

If the New Zealand Legislature had enacted that, in a concrete case such as the present one, the New Zealand Courts should have power to give the plaintiff a decree notwithstanding that the defendant held himself aloof, we should hardly have heard the suggestion that such a law was not one for the peace, order and good government of New Zealand. Of course they have framed their law in more abstract and flexible terms. But, taking those terms, their Lordships are clear that it is for the peace, order and good government of New Zealand that the Courts of New Zealand should, in any case of contracts made or to be performed in New Zealand, have the power of judging whether they will or will not proceed in the absence of the defendant. The power is a highly reasonable one. So far as regards service of process on persons not within their local jurisdiction, or substituted service, or notice in lieu thereof, in proper cases the English Courts have it conferred on them by the Imperial Parliament. The New Zealand Legislature, it is true, has only a limited authority ; but in passing the rules under discussion, it has been careful to keep within its limits.

But it was said that a judgment so obtained could not be enforced beyond the limits of New Zealand ; and several cases of suits founded on foreign judgments were

cited. Their Lordships only refer to this argument to say that it is not relevant to the present issue. When a judgment of any tribunal comes to be enforced in another country, its effect will be judged of by the Courts of that country with regard to all the circumstances of the case. For trying the validity of the New Zealand laws it is sufficient to say that the peace, order and good [345] government of New Zealand are promoted by the enforcement of the decrees of their own Courts in New Zealand.

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The only other contention related to the word "absent" in rule 53. The appellant seeks to confine it to persons who at some previous time have been domiciled or resident in New Zealand. It is not easy to appreciate the reasons why such an artificial sense should be put upon the word; and during the argument their Lordships expressed agreement with the Judges of the Court of Appeal, who held that the word is used in its ordinary sense, and describes persons who are not in New Zealand. The result is that, in their Lordships' judgment, this appeal should be dismissed with costs, and they will humbly advise Her Majesty—to that effect (1).

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(1) [See *Stairs v. Allan*, 28 Nova Scotia Rep. 410.]





# DIGEST OF CASES

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| <b>Appeal</b> —The rule of the Judicial Committee is not to grant leave to appeal in criminal cases except where some clear departure from the requirements of justice is alleged to have taken place.— <i>Riel v. The Queen</i> *—P. C. . . .                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    | iv. 1.                   |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               |                |

\* *See* 51 V. c. 43 (Dom.)



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afterwards be revoked by the Government by whom it was made and that a majority of the arbitrators could continue the proceedings and make a valid award notwithstanding the absence of the third arbitrator, who had affected to resign, and an attempted revocation of his appointment by the Government appointing him.—*In the matter of an Arbitration and Award between the Province of Ontario and the Province of Quebec*—P.C. . . iv. 712

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See TRADE AND COMMERCE, 1.

**Attorney-General.**—The Attorney-General of the Province is the officer of the Crown, who is considered as present in the Courts of the Province to assert the rights of the Crown, and of those who are under its protection. The Attorney-General of the Province, and not the Attorney-General of the Dominion, is the proper party to file an information where the complaint is not of an injury to property vested in the Crown as representing the Government of the Dominion, but of a violation of the rights of the public of the Province even though such rights are created by an Act of the Parliament of the Dominion. The Attorney-General of the Province is the proper person to file an infor-

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mation in respect of a nuisance caused by interference with a railway. Though the power of making criminal laws is vested in the Dominion Parliament, the Attorney-General of the Province is the proper officer to enforce those laws by prosecution in the Queen's Courts of justice in the Province.—*Attorney-General v. Niagara Falls International Bridge Co.*—Chy., Ont. . . . . i. 813

2. An Act of the Dominion Parliament incorporating a company for the purpose of constructing a bridge across the Niagara River from Canada to the United States, directed that the bridge should be "as well for the passage of persons on foot, and in carriages, and otherwise, as for the passage of railway trains." The bridge was completed for railway purposes only, and the time limited by the charter for completing the work having elapsed, an information was filed in the name of the Attorney-General of Ontario, seeking to enforce the terms of the charter, or for the removal of the bridge as a nuisance: *Held*, by the Court of Appeal, reversing the decision of Spragge, C., that the bridge as constructed not being a public nuisance the Attorney-General of Ontario was not the proper officer to file the information.—*Attorney-General v. International Bridge Co.*—C. A., Ont. . . . . ii. 559

Proceedings to set aside Patent. . . . . iii. 341

See PATENT OF INVENTION, 7.

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**Bankruptcy and Insolvency.**—The Act of the Legislature of Quebec (33 Vict. c. 58) for the relief of the appellant society then (as appeared on the face of the Act) in a state of extreme fi-

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nancial embarrassment is within the legislative capacity of that legislature. The Act was held to relate to a matter of a "merely local or private nature in the Province," which by the 92nd section of the B. N. A. Act, 1867, is assigned to the exclusive competency of the Provincial Legislature; and not to fall within the category of bankruptcy and insolvency, or any other class of subjects by the 91st section of the B. N. A. Act reserved for the exclusive legislative authority of the Parliament of Canada.—*L'Union St. Jacques de Montreal v. Belisle*.—P. C. . . . i.

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2. The B. N. A. Act, 1867, sect. 91, in assigning to the Dominion Parliament the subjects of bankruptcy and insolvency, conferred on it legislative power to interfere with property, civil rights and procedure within the Provinces, so far as these might be affected by a general law relating to those subjects; consequently the Dominion Enactment, 40 Vict. c. 41, s. 38, providing that the judgment of the Court of Appeal in matters of insolvency should be final, *i.e.*, not subject to the appeal as of right to Her Majesty in Council, allowed by the Lower Canada Civil Procedure Code, Art. 1178, is within the competence of the Dominion Parliament and does not infringe the exclusive powers given to the Provincial Legislatures by section 92 of the Imperial Statute; nor does it infringe the Queen's prerogative, for it only limits the right of appeal as given by the Code. The section according to the true construction of the word "final" therein, excludes appeals to Her Majesty, but contains no words which purport to derogate from the prerogative of the Queen to allow such appeals as an act of grace. It, therefore, does not interfere with the prerogative of the

Crown; and, quære, what powers may be possessed by the Parliament of Canada so to do.—*Cuvillier v. Aylwin*, 2 Knapp's P. C. C. 72, reviewed.—*Cushing v. Dupuy*.—P. C. . . . i. 252

3. Sect. 50 of the Insolvent Act of 1869, which provided that claims by and against assignees in insolvency might be disposed of by the Judge of the County Court or by the County Court on petition, and not by any suit, attachment, opposition, seizure or other proceeding whatever, was held not to be beyond the power of the Dominion Parliament, because the right to legislate on the subject of bankruptcy and insolvency belongs exclusively to that Parliament, and because at the passing of the B. N. A. Act there was a system of proceeding in insolvency in force in the former Provinces of Upper and Lower Canada very similar to the one established by the Act of 1869.—*Crombie v. Jackson*.—Q. B., Ont. . . . i. 685

4. An Act of the Dominion assuming to provide for the liquidation of all building societies in the Province of Quebec, whether solvent or not was held to be beyond the competence of the Dominion Parliament.—*McClanaghan v. St. Anne's Mutual Building Society*.—Q. B., Quebec. . . . ii. 237

5. An official assignee, or his agent, acting under an Insolvent Act of the Parliament of Canada, can sell by auction the goods of a bankrupt without taking out a license therefor; and this right cannot be restricted by a provincial enactment. The Quebec License Act, 1870, in so far as it seeks to impose a tax on the sum realized from the sale of an insolvent's effects when made under the Insolvent Act of 1869, 32-33 Vict. c. 16, and to restrain the powers of as-



- signees in putting that Act in operation is invalid.—*Coté v. Watson*.—Superior Ct., Quebec. . ii. 343
6. Sect. 59 of the Dominion Insolvent Act of 1869 provided that no lien or privilege upon the property of an insolvent should be created for a judgment debt by the issue or delivery to the sheriff of an execution, or by levying upon or seizing thereunder the effects or estate of an insolvent, if, before the payment over to the plaintiff of the moneys levied, the estate of the debtor had been assigned or placed in liquidation under that Act: *Held*, to be within the competence of the Dominion Parliament.—*Kinney v. Dudman*.—Supreme Ct., N. S. . . . ii. 412
7. An Act which provides for the examination of a debtor before a Judge, and which authorizes the Judge to grant the debtor a discharge from gaol or the limits as to the suit for which he was confined, on proof that he is unable to pay his debts, and that he has made no fraudulent transfer or undue preference, is an Insolvent Act which a Provincial Legislature has no power to pass, since the B. N. A. Act came into force, and the assent of the Governor-General does not make such an enactment valid.—*The Queen v. Chandler*.—Supreme Ct., N.B. . . ii. 421
8. The Legislature of New Brunswick, prior to the Union, passed an Act extending the gaol limits. This Act was not to come into operation until April 1st, 1868, and before that date but after the union, it was repealed by a subsequent enactment: *Held*, that the subject of gaol limits does not so relate to insolvency as to make the repealing Act ultra vires.—*McAlmon v. Pine*.—Supreme Ct., N.B. . ii. 487
9. An Act of the Legislature of New Brunswick, abolishing imprisonment for debt, was held not to be ultra vires as respects a party not shewn to be a trader or subject to the Dominion Insolvent Act.—*Armstrong v. McCutchin*.—Supreme Ct., N.B. . . . ii. 494
10. An Act of the Legislature of New Brunswick, providing that as against the assignee of the grantor under any law relating to insolvency, a bill of sale should only take effect from the time of the filing thereof, was held to be within the competence of the legislature.—*In re De Veber*.—Supreme Ct., N.B. . . . ii. 552
11. The Dominion Parliament by its Insolvent Act of 1875, enacted that any person who purchased goods on credit, knowing or believing himself to be unable to meet his engagements, and concealing the fact with intent to defraud, and who does not afterwards pay the debt, shall be held guilty of a fraud and be liable to imprisonment for two years unless the debt and costs are sooner paid, provided that in the suit for the recovery of the debt, the defendant is charged with the fraud and declared guilty of it by the judgment rendered in the suit. The plaintiff sued for goods sold and delivered to the defendants, who afterwards became insolvent under the Act, and charged them with fraud in the terms of the Act: *Held*, by a majority of the Judges of the Common Pleas, by two Judges of the Court of Appeal, and by three Judges of the Supreme Court (the other three giving no opinion on this point), that the enactment is within the competence of the Dominion Parliament.—*Peek v. Shields*.—C. A., Ont. . . . . iii. 266
12. An Act of the Nova Scotia Legislature for facilitating arrangements between railway companies and their creditors, provided that

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a company might propose a scheme of arrangement between the company and its creditors and file the same in Court and that thereafter the Court might, on application by the company, restrain any action against the company on such terms as the Court might think fit. The Act also provided that notice of filing the scheme should be published, and that thereafter no execution, attachment, or other process against the property of the company, should be available or be enforced without leave of the Court: *Held*, by Ritchie, J., that the above provisions related to bankruptcy and insolvency, and were in excess of the powers vested in a Provincial Legislature.—*Murdoch v. Windsor & Annapolis Railway Co.*—Supreme Ct., N.S. . . . iii. 368

13. By an Act of the Legislature of Nova Scotia, provision was made for the winding up of companies in general, where a resolution to that effect was passed by the company, or where the Court so ordered at the instance of a contributor, on its being made to appear that such order was just and equitable. The Act could be enforced although no debts were due by the company, but could not be called into operation by a creditor: *Held*, that the Act did not partake of the character of an insolvent law, and was within the legislative authority of a Provincial Legislature.—*In re The Wallace Huestis Grey Stone Co.*—Supreme Ct., N.S. . . . iii. 374

14. Under the provisions of an Act of the Legislature of Nova Scotia, "to facilitate arrangements between railway companies and their creditors," the Windsor & Annapolis Railway Company proposed an arrangement whereby the so-called B debenture stock of the company then bearing interest at the rate of 6 per cent. was "abrogated and determined," and in lieu

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thereof the holders of said stock were to receive allotments of new stocks thereby created, bearing lower rates of interest, and otherwise differing from the stock for which they were substituted: *Held*, (Weatherbe, J., dissenting), that so much of the Act as was necessary to the confirmation of the proposed scheme was within the legislative authority of the Legislature of Nova Scotia.—*Re Windsor & Annapolis Railway.*—Supreme Ct., N.S. . . . iii. 387

15. The Dominion Parliament, under its jurisdiction as to bankruptcy and insolvency, has authority to provide for the compulsory liquidation or winding up of a company incorporated by a Provincial Legislature.—*Shoolbred v. Clarke.*—Supreme Ct., Can. . . . iv. 459

16. The Dominion Parliament, under its jurisdiction as to bankruptcy and insolvency, has authority to provide for the compulsory liquidation or winding up of a company incorporated under a statute of the Imperial Parliament.—*Allen v. Hanson.*—Supreme Ct., Can. . . . iv. 470

17. There being no statute of the Dominion on bankruptcy and insolvency, an Act was passed by the Ontario Legislature for the purpose of enabling insolvent debtors to place their creditors on an equal footing, but not relieving the debtor from arrest or interfering with his after-acquired property: *Held*, by Burton and Patterson, JJ. A., affirming on this point the judgments of the Courts below (Hagarty, C.J., and Osler, J.A., dissenting), that the Provincial Act was intra vires.—*Clarkson v. Ontario Bank; Edgar v. Central Bank.*—C.A., Ont. . . . iv. 499

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should make a deposit with the Minister of Finance for the security of Canadian policy holders: *Held*, that this legislation was valid, and that the Canadian policy holders of an insolvent company were entitled to a distribution of the deposit, although proceedings for the winding up of the company were pending in the English courts.—*Re Briton Medical and General Life Association (Limited)*.—Ch. D., Ont. . . . . iv. 639

19. *Held*, that the provisions of sect 9 of Ontario "Act respecting assignments and preferences by insolvent persons" (Revised Statutes of Ontario, c. 124), which relate to assignments purely voluntary, and postpone thereto judgments and executions not completely executed by payment, are merely ancillary to bankruptcy law, and as such are within the competence of the Provincial Legislature so long as they do not conflict with any existing bankruptcy legislation of the Dominion Parliament.—*Attorney General of Ontario v. Attorney General for the Dominion*.—P.C. . . . . v. 266

20. The power to legislate generally, on the subject of bankruptcy and insolvency conferred on the Dominion Parliament includes the right to legislate specially for particular cases arising in connection with bankruptcy proceedings. In 1866, the Bank of Upper Canada became insolvent, and assigned all its property and assets to trustees. In 1867 an Act was passed by the Dominion Parliament which assumed to incorporate the trustees, to amend the assignment, and to give them authority to carry on the business of the bank so far as was necessary for winding up the same. Subsequently a further Act was passed by the Dominion Parliament assuming to transfer the property vested in the trustees to Her Majesty for the Dominion,

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and to confer all the powers of the trustees on the Governor in Council: *Held*, that these Acts were intra vires of the Dominion Parliament.—*Quirt v. Reg.* . . . v. 456

Imprisonment of debtor. . . ii. 527

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**Banks and Banking.**—

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**Bigamy.**—Second marriage contracted abroad. . . . iv. 665

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**Bills of Lading and Warehouse Receipts.**—A Provincial Act to the effect that all rights of suit should pass to the consignee of goods named in any bill of lading, or to the endorsee thereof, to whom the property in the goods should be transferred by such consignment or endorsement, and that every such instrument representing goods to have been shipped should, in the hands of a consignee or endorsee for value, be conclusive evidence of shipment as against the person signing the instrument, was held not to be beyond the powers of the Provincial Legislature as being an interference with trade and commerce.—*Beard v. Steele*.—Q.B., Ont. i. 683

2. The Dominion Parliament has power to legislate with respect to property and civil rights, so far as necessary for the exercise of its jurisdiction over the subjects assigned to it by the B. N. A. Act. Per Spragge, C.: The Dominion Act, 34 Vict. c. 5, s. 46, which authorizes the transfer of warehouse receipts to banks by direct endorsement, is within the powers

assigned to the Dominion Parliament and is valid.—*Smith v. Merchants' Bank*.—Chy., Ont. . i. 828

3. Although warehouse receipts granted to itself by a firm which has not the custody of any goods but its own are not negotiable instruments within the meaning of the Mercantile Amendment Act (c. 122 of the Revised Statutes), *held*, that the Dominion Bank Act (49 Vict. c. 120), while it was in force dispensed with that limitation, validated such receipts, and transferred to the indorsees thereof the property comprised therein: *Held*, further, that the Bank Act was intra vires of the Dominion Parliament. Sect. 91, sub-sect. 15, of the British North America Act, 1867, gives to that Parliament power to legislate over every transaction within the legitimate business of a banker, notwithstanding that the exercise of such power interferes with property and civil rights in the province (see sect. 92, sub sect. 13), and confers upon a bank privileges as a lender which the provincial law does not recognise. The legislation of the Dominion Parliament, so long as it strictly relates to the subjects enumerated in sect. 91, is of paramount authority even though it trenches upon the matters assigned to the Provincial Legislature by sect. 92.—*Cushing v. Dupuy*, (5 App. Cas. 409) followed.—*Tennant v. Union Bank of Canada*.—P.C. . . . v. 244

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**Companies.**—The Dominion Parliament has no power to incorporate an association for the purpose of buying, leasing and selling landed property and buildings, the operations of a society for such purpose affecting exclusively property and civil rights within the Province where they are carried on; and therefore the Act 37 Vict. c. 103, incorporating the Colonial Building and Investment Association for such objects, was held to be ultra vires, though power was given by said Act to carry on operations throughout the Dominion. Monk, J., dissenting.—*Loranger v. Colonial Building and Investment Association*—Q B, Quebec. . . . ii. 275

2. *Held*, that Canadian Act, 37 Vict. c. 103, which created a corporation with power to carry on certain definite kinds of business within the Dominion, was within the legislative competence of the Dominion Parliament. The fact that the corporation chose to con-



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fine the exercise of its powers to one Province, and to local and provincial objects, did not affect its status as a corporation, or operate to render its original incorporation illegal as ultra vires of the said Parliament: *Held*, further, that the corporation could not be prohibited generally from acting as such within the Province; nor could it be restrained from doing specified acts in violation of the provincial law upon a petition not directed and adapted to that purpose.—*Loranger v. Colonial Building and Investment Association*, reversed.—*Colonial Building and Investment Association v. Attorney-General of Quebec*.—P.C . iii. 118

3. A company incorporated by a Provincial Legislature for the business of insurance possesses the same capacity and franchises within the jurisdiction creating it as a company incorporated by the Imperial or Dominion Parliaments; and may enter into contracts outside the Province wherever such contracts are recognised by comity or otherwise. The term "Provincial objects" in the B. N. A. Act refers to local objects within a Province, in contradistinction to objects which are common to all Provinces in their collective or Dominion quality.—*Clark v. Union Fire Insurance Co.*—Master's Office, Ont. . . . . iii. 335

License to hold lands . . iv. 701  
See MORTMAIN.

Contracts—Regulation of . i. 265  
See TRADE AND COMMERCE, 1.

Copyright—*Right to legislate as to*—The B. N. A. Act was not intended to curtail the paramount authority of the Imperial Parliament as respects any of the matters assigned by the Act to the exclusive jurisdiction of the Dominion Parliament, or of the Provincial Legislatures. All that the B.N.A.

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Act intended to effect by sect. 91, sub-sect. 23, as to copyright, was to place the right of dealing with colonial copyright within the Dominion under the exclusive control of the Parliament of Canada, as distinguished from the Provincial Legislatures, in the same way as the Act has transferred the power to deal with banking, bankruptcy and insolvency, and other specified subjects, from the Provincial Legislatures, and placed them under the exclusive jurisdiction and control of the Dominion. The Parliament of the Dominion has no greater power to deal with the subject of copyright than was possessed by Provincial Legislatures prior to confederation. The Imperial Copyright Act, 5 & 6 Vict. c. 45, was in force in Canada at the time of confederation, and is in force in Canada still. It is not affected by the Canadian Copyright Act of 1875, which Act is also in force.—*Smiles v. Belford*—C. A., Ont. . . . . i. 576

Costs . . . . . iv. 370  
See NAVIGATION AND SHIPPING, 7.

County Court Judge.—By the B. N. A. Act, 1867, sect. 96, the Governor-General is authorized to appoint the Judges of the County Courts, and the Provincial Legislature of Ontario had no power to pass an Act authorizing the removal of County Court Judges by the Lieutenant-Governor for incapacity or misbehaviour and had not power to pass an Act abolishing the Court of Impeachment, which existed in Canada before the B. N. A. Act, for the trial of charges against County Court Judges. A County Court Judge may be removed by the Governor-General in Council, under the Imperial Act, 22 Geo. III. c. 75, but there is no power under that Act, or the Con. Stat. C. c. 13,

or under the Common Law, to issue a commission for a preliminary enquiry under oath with respect to such charges.—*Re Squier*—Q. B., Ont. . . . . i. 789

Power to confer jurisdiction on.  
ii. 665 ; iii. 319

See JUDGES, 2, 3, 4. . . . v. 490

## Courts.—

Constitution of. . . ii. 602, 653, *n.*

See CRIMINAL LAW, 8, 10.

Power to constitute. i. 557 ; iv. 618

See MARITIME COURT.

## PATENT OF INVENTION, 2.

Power to define jurisdiction of.  
v. 490

See JUDGES, 4.

Power to impose duties on.  
i. 158 ; ii. 378 ; iv. 288.

See PROVINCIAL COURTS.

## NAVIGATION AND SHIPPING, 3.

## IMPERIAL COURT.

**Criminal Law.**—An information under an Ontario Act for selling intoxicating liquors on Sunday was held to be so far a charge of a criminal character that the defendant could not be compelled to give evidence against himself.—*Regina v. Roddy*, Q. B., Ont. . . . . i. 709

2. A Provincial Legislature cannot legislate with respect to offences of a criminal nature, except where such legislation is required for the direct enforcement of a law of the Province made in relation to a matter coming within its exclusive jurisdiction. In legislating in regard to a matter within Provincial jurisdiction, a Provincial Legislature has no power to enforce its law by provisions respecting the trial and punishment of offenders in respect of acts which would be criminal offences

at common law. Sect. 57 of the Liquor License Act of Ontario, R. S. O. c. 181, by which it was provided that any person who, on any prosecution under that Act, tampered with a witness or induced or attempted to induce any such person to absent himself or to swear falsely, should be liable to a penalty of \$50, was therefore held to be invalid.—*Regina v. Lawrence*—Q. B. Ont. . . . i. 742

3. A Provincial Legislature has power to regulate procedure affecting penal laws which such Legislature has authority to enact. Breach of a Provincial Statute is not a “crime” within the meaning of sect. 91, sub-sect. 27 of the B. N. A. Act.—*Pope v. Griffith*—Q. B. Quebec. . . . . ii. 291

4. A Provincial Legislature has power to regulate procedure affecting penal laws which such Legislature has authority to enact. A Statute of Quebec having provided that no proceedings in civil matters before a district magistrate should be removed to any other Court by certiorari or otherwise, it was held that a proceeding before a district magistrate for the enforcement of penalties under the License Law of the Province was a civil proceeding within this enactment, and that the right to certiorari was taken away.—*Ex parte Duncan*.—Superior Ct., Quebec. . . . ii. 297

5. A Provincial Legislature has power to regulate procedure affecting penal laws which such Legislature has authority to enact — *Page v. Griffith*.—Q. B., Quebec. ii. 308

6. A Provincial Legislature has power to regulate procedure affecting penal laws which such Legislature has authority to enact. An enactment of the Quebec Legislature prescribing the mode in which penalties for violations of a Statute of the Province (41 Vict. c. 3) are



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to be enforced, was held to be  
valid.—*Coté v. Charveau*.—Super-  
ior Ct., Quebec. . . . ii. 311

7. A Provincial Legislature has  
power to pass an enactment for  
the imprisonment of a person  
making default in payment of a  
sum due on a judgment in case (a)  
he has had since the date of the  
judgment or order, the means to  
pay the sum in respect of which  
he has made default and neglects  
or refuses to pay it, or in case  
(b) the liability was incurred by  
obtaining credit under false pre-  
tences, or by means of any other  
fraud, or by the commission of an  
act for which he might be proceed-  
ed against criminally. Weldon, J.,  
dissenting.—*Ex parte Ellis*—Su-  
preme Ct., N. B. . . . ii. 527

8. An Act of the Parliament of  
Canada provided in regard to ap-  
peals from summary convictions  
made by Justices of the Peace,  
that the parties might dispense  
with a jury if they thought fit, and  
submit themselves to the judgment  
of the Court appealed to without  
a jury: *Held*, that this enactment  
was not an interference with the  
“constitution” of the Court (in  
relation to which the Provincial  
Legislatures have exclusive juris-  
diction), but that it related to  
criminal law and procedure in  
criminal matters, and therefore  
was within the jurisdiction of the  
Dominion Parliament.—*Regina v.*  
*Bradshaw*.—Q. B., Ont. . . . ii. 602

9. By a Dominion Statute “for  
avoiding doubt,” it was declared  
and enacted, “that every person  
qualified and summoned as a Grand  
Juror or as a Petit Juror in crim-  
inal cases, according to the laws  
which may be then in force in any  
Province of Canada, shall be held  
to be duly qualified to serve as  
such juror in that Province,  
whether such were laws passed be-

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fore, or be passed after the coming  
into force of the B. N. A. Act,  
1867, subject always to any pro-  
vision in any Act of the Parliament  
of Canada, and in so far as such  
laws are not inconsistent with any  
such Act.” Acts were afterwards  
passed by the Ontario Legislature  
changing the mode of selecting  
jurors in that Province: *Held*,  
that the Dominion enactment was  
not an unconstitutional delegation  
of legislative authority and was  
not ultra vires, and that a selection  
of jurors made in the manner pre-  
scribed by the Ontario Acts was  
valid for the purpose of a criminal  
trial.—*Regina v. O’Rourke*.—Q. B.  
D., Ont. . . . ii. 644

10. The Acts relating to the at-  
tendance of grand and petit jurors  
at the County Courts (Courts of  
criminal jurisdiction over all crimes  
which are not capital), are within  
the powers of the Local Legislature,  
under the B. N. A. Act, 1867,  
sect. 92, as pertaining to the “Ad-  
ministration of Justice” and the  
“Constitution and organization of  
Provincial Courts” and do not  
belong to the Parliament of Cana-  
da, under sect. 91, as “Procedure  
in criminal matters.”—*Regina v.*  
*Foley*.—Supreme Ct., N. B. . ii 652, n

11. By the Act 32 & 33 Vict.  
c. 31, s. 78 (D), it is provided that  
penalties against Justices of the  
Peace for the non-return of con-  
victions may be recovered in an  
action of debt by any person suing  
for the same in any Court of Re-  
cord: *Held*, that this provision  
was within the competence of the  
Dominion Parliament, and that a  
Provincial enactment, declaring  
that County Courts should not  
have jurisdiction in such actions,  
was thereby overborne.—*Ward v.*  
*Reed*.—Supreme Ct., N. B. . iii. 405

12. An Act of the Ontario Legis-  
lature provided that no person  
should, without written notice,

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supply to a cheese or butter manufactory milk in any way adulterated or from which cream had been taken, and imposed certain penalties for violation of the Act: *Held*, reversing the judgment of the Queen's Bench Division, that this Act was not an Act dealing with criminal law within the meaning of sub-sect. 27 of sect. 91 of the British North America Act, and was intra vires of the Provincial Legislature — An Act of the Ontario Legislature respecting appeals on prosecutions to enforce penalties and punish offences under Provincial Acts was held not to be legislation dealing with criminal procedure within the meaning of the above sub-section, and to be intra vires. — *Regina v. Wason*. — C. A., Ont. . . . . iv. 578

13. The Dominion Parliament by R. S. C. cap. 161, sect. 4 enacts that "Every one who being married marries any other person during the life of the former husband or wife whether the second marriage takes place in Canada or elsewhere is guilty of felony and liable to seven years' imprisonment," and that "nothing in this section contained shall extend to (a) any second marriage contracted elsewhere than in Canada by any other than a subject of Her Majesty resident in Canada and leaving the same with intent to commit the offence." The original Act containing in substance this enactment was passed in 1841, and its validity was subsequently affirmed by the Court of Queen's Bench in Lower Canada: *Held*, that the enactment in the Revised Statutes was valid; and that having in substance been in force in Canada for some years prior to the passing of the B. N. A. Act, it was confirmed by sect. 129 of that Act if any imperial confirmation was required. — *Regina v. Brierly*. — Ch. D., Ont. iv. 665

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Compromising Offence. . . i. 676

See LICENSES, 2.

Enforcing Temperance Act. ii. 606, 616

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Proper Officer to enforce. . i. 813

See ATTORNEY-GENERAL, 1.

**Debtor.**—*Power to provide for discharge of.*] By an Act in force in the Province of Nova Scotia at the Union, every debtor imprisoned under process from any Court was entitled to apply for and obtain his discharge. When this Act was passed there were no County Courts in Nova Scotia. In 1878 an Act of the Provincial Legislature was passed, making the above provisions applicable to persons imprisoned under process from the County Courts, and this enactment was held to be valid. — *Johnston v. Poyntz* — Supreme Ct., N. S. . . . . ii. 416

Discharge of. . . . . ii. 421,

See BANKRUPTCY AND INSOLVENCY, 7.

**Delegation.**—Subjects which in one aspect and for one purpose fall within sect. 92 of the B. N. A. Act, 1867, may in another aspect and for another purpose fall within sect. 91. *Russell v. The Queen* (7 App. Cas. 829) explained and approved. *Held*, that "The Liquor License Act of 1877," c. 181, Revised Statutes of Ontario, which, in respect of sects. 4 and 5, makes regulations in the nature of police or municipal regulations of a merely local character for the good government of taverns, etc., does not in respect of those sections interfere with the general regulation of trade or commerce, but comes within Nos. 8, 15 and 16 of sect. 92 of the Act of 1867, and is within the powers of the Provincial



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Legislature. *Held*, further, that the Provincial Legislature had power by the said Act of 1867 to entrust to a Board of Commissioners authority to enact regulations of the above character, and thereby to create offences and annex penalties thereto.—*Hodge v. The Queen*.—P. C. . . . iii. 144

2. Act No. 22 of 1869, of the Indian Legislature, which excludes the jurisdiction of the High Court within certain specified districts, is not inconsistent with the Indian High Courts Act (24 & 25 Vict. c. 104), or with the charter of the High Court, and is in its general scope within the legislative power of the Governor-General in Council. The 9th sect. of that Act which confers upon the Lieutenant-Governor of Bengal the power to determine whether the Act, or any part of it, shall be applied in a certain district, is conditional legislation, and not a delegation of legislative power. Where plenary powers of legislation exist as to particular subjects, whether in an Imperial or in a Provincial Legislature, they may be well exercised, either absolutely or conditionally; in the latter case leaving to the discretion of some external authority the time and manner of carrying its legislation into effect, as also the area over which it is to extend.—*Regina v. Burah*.—P. C. iii. 409

3. A Colonial Legislature is not a delegate of the Imperial Legislature. It is restricted in the area of its powers, but within that area it is unrestricted. *Held*, that the Customs Regulation Act of 1879, s. 133, was within the plenary powers of legislation conferred upon the New South Wales Legislature by the Constitution Act (Scheduled to 18 & 19 Vict., c. 54, ss. 1 and 45). *Held*, further, that duties levied by an Order in Coun-

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cil issued under sect. 133, are really levied by authority of the Legislature and not of the Executive. Also that under sect. 133 "the opinion of the collector," whether right or wrong, authorizes the action of the Governor.—*Powell v. Apollo Candle Co.*—P. C. iii. 432

Selection of Jurors. . . . ii. 644

See CRIMINAL LAW, 9.

### Denominational Schools

—A Provincial Legislature may legislate in regard to separate schools provided that the rights or privileges with respect to denominational schools which any class of persons had by law in the Province at the time of confederation are not prejudicially affected by such legislation. The B. N. A. Act provides by sub-s. 3 of sect. 93 that "Where in any Province a system of separate or dissentient schools exists by law at the Union, or is thereafter established by the Legislature of the Province, an appeal shall lie to the Governor-General in Council from any Act or decision of any Provincial authority affecting any right or privilege of the Protestant or Roman Catholic minority of the Queen's subjects in relation to education": *Held*, that this enactment gives an appeal in respect of those decisions alone which are legislative acts, or their equivalents, and not in respect of matters affecting merely the every-day detail of the working of a school. In election matters separate schools have the same right of appeal to a County Judge as public schools have.—*Separate School Trustees v. Belleville v. Grainger*.—Chy. Ont. i. 816

2. The provisions contained in sect. 93 of the B. N. A. Act, that nothing in any law made by a Province in relation to education

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“shall prejudicially affect any right or privilege with respect to denominational schools which any class of persons have by law in the Province at the Union,” protect those legal rights and privileges only which existed in each Province at the Union by virtue of positive legal enactment, and not privileges enjoyed under exceptional and accidental circumstances, and without legal right. At the Union the law with respect to the schools in the Province of New Brunswick was governed by the Parish School Act, under which no class of persons had any legal right or privilege with respect to denominational schools, and a subsequent Act, 34 Vict. c. 21, providing that the schools conducted thereunder should be non-sectarian, was therefore held to be valid. The constitutionality of the Act, 34 Vict. c. 21, cannot be affected by any regulations of the Board of Education made under its authority; and semble, if the Board of Education have made regulations which they ought not to have made or have not made regulations which they should have made, the case falls within sub-sect. 4 of sect. 93, of the B. N. A. Act—*Ex parte Henand*—Supreme Ct., N. B. . . . . ii. 445

3. According to the true construction of the constitutional Act of Manitoba, 1870, 33 Vict. c. 3 (Dominion Statute), having regard to the state of things which existed in Manitoba at the date thereof, the Legislature of that Province did not exceed its powers in passing the Public Schools Act, 1890. Sect. 22 of the Act of 1870 authorizes the Provincial Legislature exclusively to make laws in relation to education so as not to “prejudicially affect any right or privilege with respect to denominational schools which any class of

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persons have, by law or practice in the Province, at the union”: *Held*, that the Act of 1890, which abolished the denominational system of public education established by law since the union, but which did not compel the attendance of any child at a public school or confer any advantage in respect of attendance other than that of free education, and at the same time left each denomination free to establish, maintain and conduct its own schools, did not contravene the above proviso; and that accordingly certain by-laws of a municipal corporation which authorized assessments under the Act were valid.—*City of Winnipeg v. Barrett*. —*City of Winnipeg v. Logan*. v. 32

4. Where the Roman Catholic minority of Manitoba appealed to the Governor-General in Council against the Manitoba Education Acts of 1890, on the ground that their rights and privileges in relation to education had been affected thereby: *Held*, reversing the judgment of the Supreme Court on a case submitted to it: (a) That such appeal lay under sect. 22, sub-sect. 2, of the Manitoba Act, 1870, which applies to rights and privileges acquired by legislation in the Province after the date thereof: (b) That the Roman Catholics having acquired by such legislation the right to control and manage their denominational schools, to have them maintained out of the general taxation of the Province, to select books for their use, and to determine the character of the religious teaching therein, were affected as regards that right by the Acts of 1890, under which State aid was withdrawn from their schools, while they themselves remained liable to local assessment in support of non-sectarian schools to which they conscientiously objected: (c) That



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the Governor-General in Council has power to make remedial orders in the premises within the scope of sub-sect. 3 of sect. 22—*e.g.*, by supplemental rather than repealing legislation. — *Brophy v. Attorney General of Manitoba*.—P.C. . . . . v. 156

Direct Taxation. . . . .  
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Dominion Officer — *Seizure of salary of.*]—A Provincial Legislature has no power to declare liable to seizure the salaries of employees of the Federal Government. — *Evans v. Hudon*—Superior Ct., Quebec . . . . . ii. 346

Taxation of income . . . . . i. 592

See TAXATION, 3.

Dominion Government — *Juri-diction and Property.*] Under the B. N. A. Act, 1867, s. 108, read in connection with the third schedule thereto, all railways belonging to the Province of Nova Scotia, including the railway in suit, passed to and became vested on the first of July, 1867, in the Dominion of Canada, but not for any larger interest therein than at that date belonged to the Province. The railway in suit being, at the date of the statutory transfer, subject to an obligation on the part of the Provincial Government to enter into a traffic arrangement with the respondent company, the Dominion Government, in pursuance of that obligation, entered into a further agreement relating thereto, of the 22nd of September, 1871. Quære, whether it was

ultra vires of the Dominion Parliament, by an enactment to that effect, to extinguish the rights of the respondent company under the said agreement. But held, that Dominion Act, 37 Vict. c. 16, did not, upon its true construction, purport so to do. And although it authorized a transfer of the railway to the appellant, it did not enact such transfer in derogation of the respondent's rights under the agreement of the 22nd of September 1871, or otherwise — *Western Counties Railway Co. v. Windsor and Annapolis Railway Co.*—P.C. . . . . i. 397

2. Held, following the case of the Commissioners of the Cobourg Town Trust, 22 Grant 377, that the Commissioners of the Toronto Harbour were entitled to compensation for their services, and this whether the harbour belonged to the Dominion or the Provincial Government; as in the event of it being found to belong to the Dominion, it must be assumed that the Dominion Government intended the Commissioners to be subject to the law of the Province in which the trust was to be administered.—*Re Toronto Harbour Commissioners.*—Chy., Ont. . . i. 825

Prerogative rights. i. 722; iv. 391, 409

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*See* DENOMINATIONAL SCHOOLS.

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*See* MEDICAL PRACTITIONER.

**Elections to Parliament.**

—An Act of Canada passed before 1867 made void any contract referring to or arising out of a Parliamentary election, even for payment of lawful expenses: the Dominion Parliament passed an Act respecting Dominion elections, but not containing this or any like provision; *Held*, that this provision not having been repealed, was in force in Quebec as respects Dominion Elections under sects. 41 and 129 of the B. N. A. Act, and that therefore a promissory note given for the expenses of a subsequent Dominion election was void.—*Willett v. DeGrosbois*.—Superior Ct., Quebec . . . . . ii. 332

**Escheat**—Lands in the Province of Ontario escheated to the Crown for defect of heirs belong to the Province and not to the Dominion. At the date of passing the B. N. A. Act the revenue arising from all escheats to the Crown within the then Province of Canada was subject to the disposal and appropriation of the Canadian Legislature, and not of the Crown. Although sect. 102 of the Act vested in the Dominion the general public revenue, as then existing in the Provinces; yet by sect. 109 the casual revenue arising from lands escheated to the Crown after the Union was reserved to the Provinces—the words “lands, mines, minerals and royalties” therein including, according to their true construction, royalties in respect of lands such as escheats.—*Attorney-General v. Mercer*—P. C . . . . . iii. 1

**Evidence**—Per Torrance, J. The Dominion Parliament can confer authority upon Courts and

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Judges in Canada, to make orders for the examination in the Dominion of any witness or party in relation to any civil or commercial matter pending before any British or Foreign tribunal; and the Dominion Act, 31 Vict. c. 76, which contains provisions for this purpose, was therefore held to be valid—*Ex parte Smith*—Superior Ct., Quebec . . . . . ii. 330

2. The taking of evidence to be used in an action pending in a foreign tribunal is of extra Provincial pertinence, and does not fall within the exclusive legislative authority of the Provinces; the Dominion Act, 31 Vict. c. 76, providing for the taking of such evidence by Provincial Courts, was therefore held to be valid.—*Re Wetherell and Jones*.—Ch. D., Ont. . . . . iii. 315

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**Extradition**—The Imperial Extradition Act of 1870 is in force in Canada, notwithstanding that the B. N. A. Act previously passed, gives to the Canadian Parliament jurisdiction to carry out obligations resulting from extradition treaties.—*Ex parte Worms*.—Q. B., Quebec . . . . . ii. 315

**Federal Company**.—Power to dissolve or transfer . . . i. 233

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**Fine and Imprisonment—**

Power of Provincial Legislature to authorize punishment of same



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**Fines and Penalties.**—The Provincial Legislatures have the right to appropriate fines to municipal or other corporations — *Bennett v. Pharmaceutical Association of Quebec* . . . . . ii. 250

**Fire Insurance.**

See INSURANCE.

**Fire Marshals.** — Constitution of Court . . . . . i. 57

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**Fisheries**—The B. N. A. Act in assigning to the Parliament of Canada the right to legislate with respect to Sea Coast and Inland Fisheries, did not thereby give authority to deal with questions of property and civil rights, such as the ownership of the beds of the rivers, or of the fisheries, or the right of individuals therein. What the Act gave to Parliament was a right to legislate in regard to matters of national and general concern, such as forbidding fish to be taken at improper seasons, or in an improper manner, or with destructive instruments — such general laws as are for the benefit of the public at large as well as of the owner. Under the B.N.A. Act the exclusive rights of fishing vested in the proprietors of non-navigable rivers being in every sense of the word “property,” can be interfered with only by the Provincial Legislatures in exercise of the powers given to them to legislate respecting property and matters of a local or private nature. The rights of the provincial Government in respect of fisheries in non-navigable waters, the beds of which, not having been granted before confederation, were then vested in the provinces as

part of the public domain, do not differ from the rights of private owners which had been acquired by grant from the Crown before that date, and a lease made by the Minister of Marine and Fisheries of a non-navigable portion of a river in the Province of New Brunswick, passing partly through granted and partly through ungranted lands, was therefore held to be void.— *The Queen v. Robertson*.—Supreme Ct., Can. . . . ii. 65

**Gaol Limits.**—Power to alter. ii. 487  
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**Governor-General.**—Appeal to under B.N.A. Act, sect. 93 . . . i. 816 ; v. 156

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Authority as to issue of commissions . . . . . i. 722, 789

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COUNTY COURT JUDGE.

**Harbours**—The “Public Harbours,” which by the B. N. A. Act are declared to be the property of the Dominion, include all harbours, together with the bed and soil thereof, which the public have the right to use, and are not limited to such as at the time of Confederation, had been artificially constructed or improved at the public expense; and where a grant of part of the foreshore of a natural harbour used as such by the public, was made by the Provincial Government of Prince Edward Island subsequent to the admission of that Province into the Union the grant was held to be invalid.—*Holman v. Green*.—Supreme Ct., Can. ii. 147

**Hard Labour.**—A Provincial Legislature has power to enforce any of its laws by imposing hard labour as a punishment for the violation of them.—*Regina v. Frawley*.—C. A., Ont. . . . ii. 576

2. "Imprisonment" in No. 15 of sect 92 of the Act of 1867 (B. N. A. Act) means imprisonment with or without hard labour.—*Hodge v. The Queen.*—P. C. . iii. 144

**Immigration**—Power to restrict. . . . . v. 556  
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**Imperial Acts**

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**Imperial Court**—*Power to impose duties on.*] *Held*, (reversing the judgment of the Supreme Ct. of Nova Scotia) that the Dominion Parliament has power to confer additional jurisdiction on the Court of Vice-Admiralty at Halifax, although that court was created by an Imperial Act.—*Attorney-General of Canada v. Flint.*—Supreme Ct. Can. . . . . iv. 288

**Imprisonment**—Power to fine and imprison for same offence . . . . . ii. 320, 322, 324  
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**Indian Lands**—Those "lands reserved for the Indians," which by sect 91, sub-s. 24, of the B. N. A. Act are placed under the exclusive legislative jurisdiction of the Parliament of Canada, are those Indian lands only which have not been surrendered by the Indians, and have been reserved for their use and do not include lands to which the Indian title has been extinguished. The Ontario Legislature has power to tax against a vendee unpatented lands which the Indians have surrendered for the purpose of being sold ; all unpatented lands, whether Indian

lands or Crown lands, when once agreed to be sold, being upon the same footing as respects liability to municipal taxation.—*Church v. Fenton.*—C. P., Ont. . . . i. 831

2. Section 109 of the B. N. A. Act of 1867 gives to each Province the entire beneficial interest of the Crown in all lands within its boundaries, which at the time of the union were vested in the Crown, subject to such rights as the Dominion can maintain under sects. 108 and 117.—*Attorney-General of Ontario v. Mercer*, (8 App. Cas. 767) followed. By royal proclamation in 1763 possession was granted to certain Indian tribes of such lands "parts of our dominions and territories" as, not having been ceded to or purchased by the Crown, were reserved "for the present," to them as their hunting grounds. The proclamation further enacted that all purchases from the Indians of lands reserved to them must be made on behalf of the Crown by the Governor of the colony in which the lands lie, and not by any private person. In 1873 the lands in suit, situate in Ontario, which had been in Indian occupation until that date under the said proclamation, were, to the extent of the whole right and title of the Indian inhabitants therein, surrendered to the Government of the Dominion for the Crown, subject to a certain qualified privilege of hunting and fishing : *Held*, that by force of the proclamation the tenure of the Indians was a personal and usufructuary right dependent upon the goodwill of the Crown ; that the lands were thereby, and at the time of the union, vested in the Crown, subject to the Indian title, which was "an interest other than that of the Province in the same," within the meaning of sect. 109 : *Held* also, that by force of the



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said surrender the entire beneficial interest in the lands subject to the privilege was transmitted to the Province in terms of sect. 109. The Dominion power of legislation over lands reserved for the Indians is not inconsistent with the beneficial interest of the Province therein.—*St. Catharines Milling and Lumber Co. v. The Queen*—P.C. . . . . iv. 107

Information—Nuisance i. 813;  
. . . . . ii. 559

See ATTORNEY-GENERAL.

Insolvency.

See BANKRUPTCY AND INSOLVENCY.

Insurance -- Regulation of contracts . . . . . i. 265

See TRADE AND COMMERCE, 1.

Tax on Policies . . . . . i. 117

See TAXATION, 2.

Taxation of Companies . . iv. 7

See TAXATION, 6.

Interest—The general law having limited the rate of interest, in the absence of agreement between the parties, to six per cent., a Provincial Legislature has no power to authorize a municipal corporation to charge ten per cent. "increase" on overdue assessments, the so-called increase being but another name for interest. A municipal corporation was authorized by an Act in force at the time of confederation to charge ten per cent. on overdue assessments; the Legislature of Quebec passed an Act repealing this enactment, and providing anew for a similar charge: *Held*, by Johnson, J., that the former enactment was effectually repealed, and that the new enactment as to increase was invalid.—*Ross v. Torrance*—Superior Ct., Quebec. . . . ii. 352

2. The general law having provided that on any contract or agree-

reement any person may stipulate for any rate of interest or discount which may be agreed on, an Act of the Quebec Legislature, authorizing a company to pay such rate of interest for advances as might be agreed, and to make arrangements allowing such interest either by selling obligations bearing a lower rate of interest below par, or by issuing them at par, bearing the agreed rate of interest, was held to be within the competence of the Provincial Legislature. A Provincial Legislature may give local corporations authority to borrow money at any rate of interest already legalized as to other persons have the right to borrow.—*Royal Canadian Insurance Co. v. Montreal Warehousing Co.*—Superior Ct., Quebec . . . ii. 361

3. The matter of interest which the Dominion Parliament is empowered to deal with by virtue of sect. 91, sub-sect. 19 of the British North America Act is interest in connection with debts originating in contract. The Municipal Act of Manitoba fixes certain times for the payment of taxes and provides that in case of non-payment at the times so fixed an addition of ten per cent. is to be made to the original amount of the tax: *Held*, reversing the judgment of the court below, Gwynne J. dissenting, that the ten per cent. so added was not "interest" within the meaning of sect. 91, sub-sect. 19 of the British North America Act, but constituted only an additional rate or tax by way of penalty for non-payment which the local legislature, under its authority to legislate with respect to municipal institutions, had power to impose.—*Ross v. Torrance*, 42 Legal News 186, overruled.—*Lynch v. Canada North West Land Co.* . . . . . v. 427

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**Intoxicating Liquors.**—Under the exclusive legislative authority given to it with regard to "Municipal Institutions" and to "matters of a merely local or private nature in the Province," a Provincial Legislature can confer on municipal corporations power to pass by-laws wholly prohibiting the sale of spirituous liquors in shops and places other than houses of public entertainment, and limiting the number of tavern licenses; and the conferring such power is not an interference with "the regulation of trade and commerce," assigned exclusively to the Dominion Parliament.—*St. v. Village of Orillia*.—Q. B., Ont. . . . i. 688

2. An Act of the Parliament of Canada prohibited the traffic in intoxicating liquors, except under certain restrictions, in any county or city the inhabitants of which chose to take the steps therein prescribed for the adoption of its provisions: *Held*, by the Privy Council, that such an Act was within the jurisdiction of the Dominion Parliament.—*Russell v. The Queen*.—P. C. . . . ii. 12

3. The state of things existing in the confederated Provinces at the time of confederation, and more particularly that which was recognised by law in all or most of the Provinces, is a useful guide in the interpretation of the meaning attached by the Imperial Parliament to indefinite expressions employed in the B. N. A. Act. At the time of confederation, the right to prohibit the sale of intoxicating liquors was possessed by the municipal authorities under the laws in force respecting municipal institutions in the then Province of Canada and in Nova Scotia, and consequently is to be deemed included in the provision as to "municipal institutions" contained in sect. 92, sub-s. 8, of the B. N.

A. Act. The Provincial Legislatures have the power for the purposes of municipal institutions to pass a prohibitory liquor law, or a liquor law which is prohibitory except under certain conditions; this power is not incompatible with the right of the Dominion Parliament to pass a prohibitory liquor law for the whole Dominion.—*Corporation of Three Rivers v. Sulte*.—Q. B., Quebec. . . ii. 280

4. The Provincial Legislatures may make reasonable regulations for the preservation of good order in the municipalities under their control, and may, for this purpose, restrict the sale of spirituous liquors. The provision of the Quebec Statute, 33 Vict. c. 74, s. 4, ordering houses in which spirituous liquors are sold, to be closed on Sundays, and on every day from eleven of the clock at night, until five of the clock in the morning, is within the competence of a Provincial Legislature.—*Blouin v. Corporation of Quebec*.—Superior Ct., Quebec . . . . . ii. 368

5. Provincial Legislatures can make laws regulating the sale of liquors in taverns and public places, in order the better to maintain peace and good order, but they cannot directly or indirectly prohibit the manufacture or sale of spirituous liquors, or other articles of commerce, or confer authority for that purpose on municipal councils.—*De St. Aubyn v. Lafrance*.—Circuit Ct., Quebec ii. 392

6. A Statute of Nova Scotia, passed after confederation, imposed penalties for retailing intoxicating liquors without a license, and provided that licenses should only be granted upon the recommendation of the grand jury, concurred in by two-thirds of the members present, and accompanied by a petition for the license



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from two-thirds of the ratepayers of the polling district in which the tavern was to be established. Enactments not essentially different were in force in the Province before confederation: *Held*, that the Act in question was not ultra vires of the Legislature. *Held*, further, that if the restrictions were ultra vires, the proper course was to apply for a mandamus to compel the granting of a license, and that a refusal to grant licenses did not justify selling without a license or release from the statutory penalty thereby incurred. A Provincial Legislature is entitled to legislate with a view to regulate within the Province the sale of whatever may injuriously affect the lives, health, morals or well-being of the community, whether it be intoxicating liquors, poisons, or unwholesome provisions, if such legislation is made bona fide with the object of regulation alone, even though to a certain extent trade and commerce are affected thereby.—*Keefe v. McLennan*.—Supreme Ct., N.S. . . . ii. 400

7. A New Brunswick statute, 36 Vict. c. 10, empowered the General Sessions of the Peace to grant licenses as in their discretion they should think proper, and they having refused to grant a license to any person whatever, a mandamus was granted for the purpose of compelling them to issue a license to the applicant. The Legislature of New Brunswick by an Act subsequent to confederation declared that “no license for the sale of spirituous liquors shall be granted or issued within any parish or municipality in the Province when a majority of the ratepayers, residents in such parish or municipality, shall petition the Sessions or municipal council against issuing any license within such parish or municipality.”

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Prior to confederation, there had been no legislation of this character in New Brunswick, and this enactment was held by the Supreme Court of that Province to be beyond the competence of the Legislature.—*Regina v. Justices of King's*.—Supreme Ct., N.B. ii. 499

8. The Provincial Legislatures have authority to prohibit or regulate the sale of liquors in saloons or taverns on Sundays, or at special times. The Statute 42 43 Vict. c. 4 (Quebec) which requires houses in which spirituous liquors, etc., are sold, to be closed during the whole of Sunday, and on every other day between 11 p.m. and 5 a.m. is valid. (Ritchie, C.J., and Strong and Fournier, J.J.)—*Poulin v. Corporation of Quebec*.—Supreme Ct., Can. . . . iii. 230

9. The old Province of Canada by an Act incorporating the city of Three Rivers conferred on the council authority to make by-laws for restraining and prohibiting the sale of intoxicating liquors or for authorizing such sale subject to such conditions as might be deemed expedient. In 1875 the Legislature of Quebec by a consolidation Act repealed the above and other Acts relating to Three Rivers and re-enacted the former provisions as to the sale of intoxicating liquors: *Held*, (affirming the judgment of the Queen's Bench) that the Act of 1875 was valid.—*Sulte v. Corporation of Three Rivers*.—Supreme Ct., Can. . . . iv. 305

10. The Canada Temperance Act being a general law enacted by the Dominion Parliament, when brought into force in any municipality by a majority of the votes of the qualified electors therein, may be enforced through the medium of Provincial officers appointed and paid for according to

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Provincial legislation, and a Provincial law making provision for such enforcement was held to be valid.—*License Commissioners of Frontenac v County of Frontenac*.—Ch. D., Ont. . . . iv. 683

11. The general power of legislation conferred upon the Dominion Parliament by s. 91, of the British North America Act, 1867, in supplement of its therein enumerated powers, must be strictly confined to such matters as are unquestionably of national interest and importance; and must not trench on any of the subjects enumerated in s. 92, as within the scope of provincial legislation unless they have attained such dimensions as to affect the body politic of the Dominion. Dominion enactments, when competent, override but cannot directly repeal provincial legislation. Whether they have in a particular instance effected virtual repeal by repugnancy is a question for adjudication by the tribunals, and cannot be determined by either the Dominion or Provincial legislature. Accordingly the Canada Temperance Act, 1886, so far as it purported to repeal the prohibitory clauses of the old provincial Act of 1864 (27 & 28 Vict. c 18) was ultra vires the Dominion. Its own prohibitory provisions are, however, valid when duly brought into operation in any provincial area, as relating to the peace, order, and good government of Canada; *Russell v. Reg.* (7 App. Cas. 829) followed; but not as regulating trade and commerce within s. 91, sub-s. 2, of the Act of 1867; *Citizens' Insurance Co. v. Parsons* (7 App. Cas. 96) distinguished and *Municipal Corporation of Toronto v. Virgo* ([1896] A. C. 93) followed. Held, also, that the local liquor prohibitions authorized by the Ontario Act, 53

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Vict. c. 56, s. 18, are within the powers of the provincial legislature. But they are inoperative in any locality which adopts the provisions of the Dominion Act of 1886.—*Attorney-General for Ontario v. Attorney-General for the Dominion*.—P. C. . . . v. 295

Criminal offence . . . ii. 606, 616

See TEMPERANCE ACT OF 1864, 3.

Licenses.

See LICENSES.

Regulation of taverns . . . iii. 144

See DELEGATION, 1.

Judges —*Jurisdiction respecting.*]—By an Act of the Legislature of New Brunswick since confederation, 39 Vict. c. 5, it was provided that Courts should be established for the trial of civil causes before commissioners appointed by the Lieutenant-Governor in Council. The jurisdiction of the commissioners was limited to \$40 in actions of debt, and \$16 in actions of tort; and was further restricted in special cases. On an application to set aside a judgment obtained before a commissioner appointed as above provided, on the ground that since the passing of the B. N. A. Act, a Lieutenant-Governor had no power to appoint Judges of any kind, the New Brunswick Act was held to be valid. Allen, C.J., and Duff, J., dissenting.—*Ganong v. Bayley*—Supreme Ct. N.B. . . . ii. 509

2. In the Province of Ontario there were in existence at the Union, in addition to the Superior and County Courts, other Courts styled Division Courts, for the trial of small causes; of these Division Courts there were several in every county; and they had since their establishment been always presided over by the County Court Judges. An Ontario Statute passed after the Union, pro-



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vided in effect that two or more counties might be grouped together by the Lieutenant-Governor for judicial purposes therein specified, and the Act conferred on the County Court Judges of grouped counties, the same authority to try suits in each of the grouped counties, as they possessed in their own counties respectively: *Held*, that the Provincial Legislature had complete jurisdiction over the Division Courts, and could appoint the officers to preside over them, and that the enactment in question, as regarded these Courts, was valid. *Armour, J.*, dissenting — *Wilson v. McGuire* — Q. B. D., Ont. . . . . ii. 665

3. An Act of the Ontario Legislature provided that the County Judge of one county might preside at the Sessions in a county other than that of which he was Judge: *Held*, by *Armour* and *O'Connor, JJ.*, (*Wilson, C.J.*, doubting), that this enactment was not within the competence of the Legislature. — *Gibson v. McDonald* — Q. B. D., Ont. . . . . iii. 319

4. The British North America Act in giving the provincial legislatures authority to make laws regarding the constitution, maintenance and organization of provincial courts confers exclusive power to define the jurisdiction of the courts territorially as well as in other respects, and also to define the jurisdiction of the judges who constitute such courts. — *In re County Courts of British Columbia* — Supreme Ct. Can. . . . . v. 490

Commission of enquiry. . . . i. 789

See COUNTY COURT JUDGE.

Jurors—Selection of ii. 644, 653 n.

See CRIMINAL LAW, 9, 10.

Justices of the Peace.—An Act of the old Province of Canada authorized the Governor to appoint

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Police Magistrates; the Act was temporary: *Held*, that an Act of the Ontario Legislature, continuing the same in force was valid. — *The Queen v. Reno* — Q. B., Ont. i. 810

2. Under the B. N. A. Act, the right to appoint Magistrates: such as District Magistrates, in the Province of Quebec, is vested in the Provincial Executives; and this right is not affected by the provisions contained in sects. 90 and 130 of that Act. — *Regina v. Horner*. — Q. B., Quebec. . . . . ii. 317

3. The right of the Provincial Legislatures to legislate in relation to the Administration of Justice, includes the right to make provision for the appointment of Police Magistrates and Justices of the Peace by the Lieutenant-Governor. — *Regina v. Bennett* — Q. B. D., Ont. . . . . ii. 634

4. *Held* by *Wilson, C.J.* (*Armour* and *O'Connor, JJ.*, expressing in this case no opinion on the point), that the power to appoint Police Magistrates is vested in the Lieutenant-Governors of the Provinces under sect. 92 of the B. N. A. Act. — *Richardson v. Ransom*. — Q. B. D., Ont. . . . . iv. 630

5. Laws providing for the appointment of Justices of the Peace relate to the administration of justice and fall within the powers of the Provincial Legislatures — *Regina v. Bush*. — Q. B. D., Ont. iv. 690

Lands.—*Held*, that a conveyance by the Province of British Columbia to the Dominion of "Public Lands," being in substance an assignment of its right to appropriate the territorial revenues arising therefrom, does not imply any transfer of its interest in revenues arising from the prerogative rights of the Crown. The precious metals in, upon and under such lands are not incidents of the land but belong to the Crown, and un-

der sect. 109 of the B.N.A. Act of 1867, beneficially to the Province, and an intention to transfer them must be expressed or necessarily implied. — *Attorney-General of British Columbia v. Attorney-General of Canada*.—P.C. . . . iv. 241

Escheat. . . . . iii. 1

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Indian Lands.

See INDIAN LANDS.

License to hold . . . . iv. 701

See MORTMAIN.

**Legislative Power.**—The B. N. A. Act in assigning either to Dominion or Provincial Legislatures, power to legislate on any particular subject, gives at the same time all the incidental subjects of legislation necessary to the exercise of the powers so assigned. — *Bennett v. Pharmaceutical Association of Quebec*.—Q.B., Quebec. ii. 250

2. *Held*, that 34 & 35 Vict. c. 28, which authorizes the Parliament of Canada to provide for "the administration, peace, order and good government of any territory, not for the time being included in any Province," vests in that Parliament the utmost discretion of enactment for the attainment of those objects. Accordingly Canadian Act 43 Vict. c. 25, is *intra vires* the Legislature. —Sect. 76, sub-s. 7, which prescribes that full notes of evidence be taken, is literally complied with when those notes are taken in shorthand.—*Riel v. The Queen*. —P.C. . . . . iv. 1

3. *Held*, that 15 & 16 Vict. c. 72, on its true construction, empowers the Legislature of New Zealand to subject to its tribunals persons who are neither by themselves nor their agents present in the colony: *Held*, further, that a law of the

local legislature authorizing the local courts in any case of contracts made or to be performed in the colony to decide whether they will or not proceed in the absence of the defendant is *intra vires* and reasonable. Whether a judgment against an absentee without service of the writ will be enforced by the courts of another country is a matter for those courts to determine, and does not affect the validity of the local law.—*Ashbury v. Ellis*. v. 636

**Legislatures of Ontario and Quebec.**—The powers conferred by the B. N. A. Act, 1867, sect. 129, upon the Provincial Legislatures of Ontario and Quebec, to repeal and alter the statutes of the old Parliament of Canada, are precisely co-extensive with the powers of direct legislation with which those bodies are invested by the other clauses of the Act of 1867. The Act 22 Vict. c. 66, of the Province of Canada, which created a corporation having its corporate existence and rights in the Provinces of Ontario and Quebec, afterwards created by the B. N. A. Act, could not, after the B.N.A. Act, be repealed or modified by the Legislature of either of these Provinces, or by the conjoint operation of both Provincial Legislatures, but only by the Parliament of the Dominion. The Quebec Act, 38 Vict. c. 64, which assumed to repeal and amend the said 22 Vict. c. 66, and (1) to destroy a corporation which had been created by the Parliament of the Province of Canada before the B. N. A. Act, and to substitute a new corporation; (2) to alter materially the class of persons interested in the corporate funds, and not merely to impose conditions upon the transaction of business by the corporation within the Province, was held invalid.—*Citizens Insurance Company of Canada v. Parsons* (7



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App. Cas. 96), approved and distinguished.—*Dobie v. Temporalities Board*.—P. C. . . . i. 351

See PROVINCIAL LEGISLATURES.

**Licenses.**—*Power to make laws respecting.*]—The right conferred on Provincial Legislatures by sub-s. 9 of sect. 92 of the B. N. A. Act, to deal with “shop, saloon, tavern, auctioneer, and other licenses,” does not extend to licenses on brewers. *Regina v. Taylor* (36 U. C. Q. B. 218), overruled. Ritchie and Strong, J.J., dissenting.—*Severn v. The Queen*.—Supreme Ct. Can. . . . i. 414

2. The Legislature of Ontario having passed an Act to regulate tavern and shop licenses: *Held*, that they had power to enact that any person who, having violated any of the provisions of the Act, should compromise the offence, and any person who should be a party to such compromise should, on conviction, be imprisoned in the common gaol for three months: and that such enactment was not opposed to sect. 91, sub-s. 27, of the B. N. A. Act, by which criminal law is assigned exclusively to the Dominion Parliament.—*Regina v. Boardman*.—Q. B., Ont. . . i. 676

3. The B. N. A. Act in conferring legislative jurisdiction over particular subjects, must be held to have given at the same time the powers needed for the effective exercise of the jurisdiction granted; consequently, the right conferred on Provincial Legislatures to make laws in relation to shop, saloon, tavern, auctioneer and other licenses includes the right of imposing penalties for violating the provincial laws in relation to those subjects. Provincial enactments by which persons who sell liquor by wholesale are required to take out a license are not invalid as an in-

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terference with trade and commerce.—*Ex parte Leveillé*.—Superior Ct., Quebec. . . . ii. 349

4. Provincial Legislatures can impose fines and penalties for selling liquor without license.—*Regina v. McMillan*.—Supreme Ct., N.B. . . . ii. 489

5. Per Spragge, C. J.: The jurisdiction of a Provincial Legislature to legislate respecting licenses is not confined to the object of raising a revenue.—*Regina v. Frawley*.—C. A., Ont. . . . ii. 576

6. The inspector of licenses for the revenue district of Montreal, charged a drayman in the employ of certain brewers duly licensed under the Dominion Statute, 43 Vict., c. 19, before the Court of Special Sessions of the Peace, at Montreal, with having sold beer outside the business premises of the brewers, but within the said revenue district in contravention of the Quebec License Act of 1878. Thereupon the brewers claiming inter alia, that being licensed brewers under the Dominion Statute they had the right to sell beer by and through their employees and draymen without a Provincial license, and that the Quebec License Act and its amendments were ultra vires, and if constitutional did not authorize the complaint, caused a writ of prohibition to be issued out of the Superior Court enjoining the Court of Special Sessions of the Peace from further proceeding: *Held*, per Ritchie, C. J., and Strong, Fournier and Henry, J.J., that the Quebec License Act and its amendments were intra vires, and that the Court of Special Sessions of the Peace at Montreal, having jurisdiction to try the alleged offence, and being the proper tribunal to decide the question of fact and of law involved, a writ of prohibition did not lie. Per Tas-

chereau and Gwynne, JJ., that the case was one which it was proper for the Superior Court to deal with by proceedings on prohibition.—Per Gwynne, J. The Quebec license Act of 1878 imposes no obligation on brewers to take out a Provincial license to enable them to sell their beer, and therefore the Court of Special Sessions of the Peace had no jurisdiction, and prohibition should issue absolutely. *Semble*: A license from the Dominion Government granting authority to a brewer to manufacture beer, does not confer the right to sell the beer manufactured under such license elsewhere than on the brewer's premises.—*Molson v. Lambe*.—Supreme Ct., Can. . iv. 334

7. The New Brunswick Liquor License Act, 1887, provides that applications for licenses must be accompanied by a certificate that the applicant is a fit person to hold a license and his premises suitable for the purpose, and that such certificate shall be signed by at least one-third of the ratepayers for the polling sub-division. The Act also provides that no person holding a license shall be qualified to sit on the commission of the peace, to be a member of a municipal council, or a teacher in a public school: *Held*, that these enactments were valid.—*Danaher v. Peters*.—Supreme Ct., Can. . . . iv. 425

Butchers . . . . . ii. 335, 340

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Local Works and Undertakings.—By an Act of the Province of New Brunswick, passed prior to confederation, the plaintiff company was incorporated for the purpose of constructing a railway from the city of St. John, in that Province, westward to the boundary of the United States. After confederation another Act (32 Vict. c. 54) was passed for the purpose of removing doubts respecting the liability of subscribers for shares in the company, and this latter Act was held to be within the competence of the Provincial Legislature. The fact of the legislature of a foreign country authorizing the construction of a line of railway in that country for the purpose of connecting with a Provincial railway, does not in any way affect the authority of the Legislature of the Province to legislate with respect to the railway within the bounds of the Province.—*European and North American Railway Co. v. Thomas*.—Supreme Ct., N.B. ii. 439

2. All works which are wholly within one Province, whether the undertaking to which they belong be for a commercial purpose or otherwise, are within the control, and subject to the legislation of the Province in which they are situate, unless they are by the Par-



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liament of Canada declared to be for the general advantage of Canada, or for the advantage of two or more of the Provinces. The Dominion Parliament cannot without such declaration, authorize a company to establish in two or more Provinces, works needing special legislative authority, and which are in their nature local in each Province, the jurisdiction in such case to give the needed authority, being determined by the location and object of the works, and not by the circumstance that the company is authorized to make them in several Provinces. A company was incorporated by Act of the Dominion Parliament for the purpose of establishing telephone lines in the several Provinces of the Dominion, but not of connecting two or more Provinces by telephone lines, nor was the undertaking declared to be for the general advantage of Canada, or of two or more of the Provinces, and in the absence of these conditions it was held that the Act, so far as it professed to confer a right to erect poles in the streets of cities and towns was invalid.—*Regina v. Mohr*.—Q. B., Quebec. . . . ii. 257

Magistrates. — Appointment of.

See JUSTICES OF THE PEACE.

Maritime Court.—The Act 40 Vict. c. 21, D., establishing a Maritime Court, with jurisdiction limited to the Province of Ontario, is within the powers of the Dominion Parliament.—*The Picton*.—Supreme Ct., Can. . . . i. 557

Markets.—A statute of the Province of Quebec gave to the council of the city of Montreal authority to regulate and license the sale in any private stall or shop in the city, outside of the public meat markets, of any meat, fish, vegetables, or provisions usu-

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ally sold in markets: *Held*, affirming the judgments of the Courts below, that the enactment was intra vires of the Provincial Legislature. — *Pigeon v. Recorder's Court*.—Supreme Ct., Canada. iv. 442

Power to regulate. . . . i. 756

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Matters of a Merely Local or Private Nature.—Direct taxation for local purpose. . . i. 95

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Restricting sale of Liquor. . . i. 688

See INTOXICATING LIQUORS, 1.

Medical Practitioner — *Registration*.]—The Imperial Parliament having enacted since confederation that any person registered as a medical practitioner under the English Medical Act (21 & 22 Vict. c. 90), shall be entitled to be registered in any colony upon payment of the fees required for such registration and that the term "colony" shall include any of Her Majesty's possessions which have a Legislature, the enactment was held to apply to Canada and to override Provincial regulations for the examination of applicants for registration, notwithstanding the confederation Act and the exclusive power given thereby to the Provinces to legislate in relation to education.—*Regina v. College of Physicians and Surgeons, Ontario*. —Q. B. Ont. . . . . i. 761

Military and Naval Service.—The Parliament of Canada has, under the B. N. A. Act, exclusive jurisdiction in matters relating to militia, military and na-

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val service, and defence, and consequently, the provisions of the Imperial Army Act, 1881, do not apply to Canada, so as to make persons not connected with the active militia of the Dominion liable in respect of acts which are offences under the Imperial A t, but not under the Militia Act of Canada.—*Holmes v. Temple*.—Sessions of the Peace, Quebec. . ii. 396

**Mortmain.**—An Act of the Dominion Parliament, incorporating a company and purporting to enable the company to hold lands, may operate as a license from the Crown for this purpose. Such an Act would not prevent the Province from passing a law preventing altogether or restricting the holding of lands by corporations in the Province.—*McDiarmid v. Hughes*.—Q. B. D., Ont. . . iv. 701

**Municipal Institutions.**—The provision contained in the Municipal Act of Ontario, authorizing city councils to pass by-laws “for preventing criers and vendors of small ware from practising their calling in the market, public streets and vacant lots adjacent thereto,” is not ultra vires of the Ontario Legislature, as being a regulation of trade and commerce. In giving jurisdiction to the Provincial Legislatures in all matters relating to municipal institutions, the intention must have been that these Legislatures should have power to alter and amend all the existing laws with respect to such institutions, and especially to enlarge the scope of a power existing in the Municipal Act at the time of confederation.—*Harris v. City of Hamilton*.—Q. B., Ont. . . i. 756

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Taxes, penalty for non-payment . . . . . v. 427

See INTEREST, 3.

**Navigation and Shipping.**

—The power to incorporate a navigation company the operations of which are limited to a particular Province, belongs exclusively to the Legislature of such Province.—*Macdougall v. Union Navigation Co.*—Q. B., Quebec . . ii. 228

2. The Government of the Province of Quebec having by letters patent granted a water lot extending into deep water at the mouth of the River St. Maurice, the letters patent were held to be valid, subject to an implied restriction that the requirements of navigation and commerce were not to be interfered with or injured thereby.—*Normand v. St. Lawrence Navigation Co.*—Q. B., Quebec. ii. 231

3. The Dominion Parliament can confer on the Vice-Admiralty Courts jurisdiction in any matter of navigation and shipping within the territorial limits of the Dominion. When an Act of the Parliament of Canada is in part repugnant to an Imperial Statute, effect will be given to the former so far as its provisions do not conflict with those of the Imperial enactment.—*The Farewell*.—Vice-Admiralty Ct., Quebec. . . ii. 378

4. A Provincial enactment authorizing the erection of booms in a navigable river does not conflict with the power of the parliament of Canada with respect to navigation and shipping under sect. 91 of the B. N. A. Act the words navigation and shipping being employed in that section in the sense in which they are used in the several Acts of the Imperial Parliament relating to navigation and shipping, and in the Act of the Parliament of Canada, 31 Vict. c.



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58, viz.: As giving the right to prescribe rules and regulations for vessels navigating the waters of the Dominion, and not as excluding for all purposes Provincial jurisdiction over navigable waters.—*McMillan v. Southwest Boom Co.*—Supreme Ct., N.B. . . ii. 542

5. A Provincial Legislature may incorporate a boom company, but cannot confer upon the company power to obstruct the navigation of a tidal and navigable river, *Taschereau, J.*, doubting.—*McMillan v. Southwest Boom Co.*, (1 P. & B. 715), overruled in part.—*Queddy River Driving Boom Co. v. Davidson.*—Supreme Ct., Can. iii. 243

6 The control over navigation conferred on the Dominion Parliament by the B.N.A. Act does not prevent the Provincial Legislatures from exercising municipal and police control on navigable rivers; consequently the Quebec Act 43 & 44 Vict. c. 62, extending the limits of the town of St. John's to the middle of a navigable river was held to be valid, and to confer the right to tax property within the added limits. Judgment of the Court of Queen's Bench on this point affirmed.—*Central Vermont Railway v. St. John's*—Supreme Ct., Can. . . iv. 326

7. Notwithstanding the exclusive legislative authority over navigation and shipping possessed by the Dominion Parliament, a Provincial Legislature can confer on municipalities the right to tax ferrymen and ferries; consequently the Quebec Act, 39 Vict. c. 52, by which the city of Montreal is authorized to impose an annual tax on ferrymen or steamboat ferries is valid. The appellants, while successful on other grounds, having failed to seriously impugn the Act in question, were ordered to pay the costs of the Attorney-Gen-

eral—*Longueuil Navigation Co. v. City of Montreal.*—Supreme Ct., Can. . . . . iv. 370

**New Brunswick**—Statutes.

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**Nuisances.**—The power of the Parliament of Canada to enact a general law of nuisance, as incident to its right to legislate as to criminal law, is not incompatible with a right in the Provincial Legislatures to authorize municipal corporations to pass by-laws against nuisances hurtful to public health as incidental to municipal institutions.—*x parte Pillow.*—Superior Ct., Quebec . . iii. 357

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**Ontario**—Power of Legislature to repeal or modify laws of Province of Canada . . . . i. 351

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**Patent of Invention.**—Proceedings in the nature of a scire facias, to set aside letters patent of invention issued under the Dominion Statute, 35 Vict. c. 26, cannot be instituted in the name of a Provincial Attorney General, and can only be legally brought by the Attorney-General of Canada.—*Mousseau v. Bate.*—Court of Review, Quebec. . . . iii. 341

2. The Dominion Parliament, having in the year 1872 passed an Act respecting patents of invention which by sect. 28 provided that all patents were to be subject to certain conditions non-compliance with which should render them void, and that the Minister of Agriculture or his deputy should

have authority to finally determine any dispute as to whether a patent had or had not become void : *Held*, that a court or judicial tribunal for the determination of the matters referred to in the said section was thereby constituted and that the constitution of such a court was within the competence of the Dominion Parliament.—*In re Bell Telephone Co.*—C. P. D., Ont. iv. 618

**Pardoning Power.**—The Ontario Legislature, by an Act respecting the Executive Administration of Laws of the Province provided that in matters within the jurisdiction of the Legislature all powers, authorities and functions which, in respect of like matters, were vested in or exercisable by the Governors or Lieutenant-Governors of the several Provinces now forming part of the Dominion of Canada, or any of the said Provinces under commissions, instructions or otherwise, should “so far as this Legislature has power thus to enact,” be vested in and exercisable by the Lieutenant-Governor or administrator for the time being of the Province : *Held*, that this enactment was not beyond the competence of the Provincial Legislature. — *Attorney-General for Canada v. Attorney-General of Ontario.*—Supreme Ct., Can. . . . . v. 517

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**Precious Metals.**—Right of Province to . . . . iv. 241

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**Prerogative of Crown.**—The provisions of the B.N.A. Act have not superseded the prerogative

right of the Crown to issue a commission to the Judge of the Provisional Judicial District of Algoma to hold a court of Oyer and Terminer and General Gaol delivery, for trial of felonies, etc.; and such a commission by the Deputy of the Governor-General was held to be legal. Per Wilson, J.—The Lieutenant-Governor, as well as the Governor-General has the power to issue commissions to hold Courts of Assize.—*Regina v. Amer.*—Q. B., Ont. . . . i. 722

2. The petitioner having been declared duly elected a member to represent the Electoral District of Montmanier in the Legislative Assembly of the Province of Quebec, his election was afterwards, on petition, declared null and void by judgment of the Superior Court under the Quebec Controverted Elections Act, 1875, and himself declared guilty of corrupt practices, both personally and by his agents. He now applied for special leave to appeal to Her Majesty in Council : *Held*, that such application must be refused. Although the prerogative of the Crown cannot in general be taken away except by express words, and the 90th sect. of the above Act providing that “such judgment shall not be susceptible of appeal,” does not mention either the Crown or its prerogative ; yet the fair construction of the Act was held to be that it was the intention of the Legislature to create a tribunal for the purpose of trying election petitions in a manner which should make its decision final for all purposes, and should not annex to it the incident of its judgment being reviewed by the Crown under its prerogative ; and the Act having been assented to on the part of the Crown, and the Crown being therefore a party to it, there was held to be no prerogative right to admit



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an appeal contrary to the intention of the Act.—*Theberge v. Landry*.—P. C. . . . ii. 1

3. The Queen is the head of the constitutional government of Canada, and in matters affecting the Dominion at large her prerogatives are exercised by the Dominion Government. The prerogative privilege to priority over other creditors of equal degree belongs to the Crown as representing the Dominion of Canada, when claiming as a creditor of a Provincial corporation in a Provincial court.—*Reg. v. Bank of Nova Scotia*—Supreme Ct., Canada. . . iv. 391

4. The Queen is the head of the constitutional government of Canada, and in matters affecting the Dominion at large her prerogatives are exercised by the Dominion Government. The prerogative privilege to priority over other creditors of equal degree belongs to the Crown as representing the Dominion of Canada when claiming as a creditor of an insolvent bank.—*Maritime Bank v. The Queen*.—Supreme Ct., Can. . iv. 409

5. The British North America Act, 1867, has not severed the connection between the Crown and the Provinces; the relation between them is the same as that which subsists between the Crown and the Dominion in respect of the powers, executive and legislative, public property and revenues as are vested in them respectively. In particular, all property and revenues reserved to the provinces by sects 109 and 126 are vested in Her Majesty as sovereign head of each province. *Held*, affirming a judgment of the Supreme Court of Canada, that the provincial government of New Brunswick, being a simple contract creditor of the Maritime Bank of the Dominion of Canada

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in respect of public moneys of the Province deposited in the name of the Receiver-General of the Province, is entitled to payment in full over other depositors and simple contract creditors of the bank, its claim being for a Crown debt to which the prerogative attaches.—*Liquidators of the Maritime Bank of Canada v. Receiver-General of New Brunswick*.—P. C. v. 1

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280, 392, 382, 385; iii. 348; iv. 305; v. 295.

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Property and Civil Rights.

—An Act of the Legislature of Quebec authorizing the Lieutenant-Governor to revoke the right of certain municipalities to exact tolls on a toll bridge, for default in making repairs, and to transfer the property to others, was held valid, as the matter related to property and civil rights and was of a merely local nature.—*Municipality of Clere'and v. Municipality of Melbourne and Brompton Gore*.—Q. B., Quebec . . ii. 241

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2. Quære, whether the Dominion Act, 32-33 Vict. c. 29, s. 134, relating to costs in actions against Justices, is not ultra vires of the Federal Parliament as relating to procedure in a civil matter.—*Whittier v. Diblee*—Supreme Ct., N. B. . . . . ii. 492

3. The jurisdiction of the Provincial Legislatures over "property and civil rights" does not preclude the Parliament of Canada from giving to an informer the right to recover, by a civil action, a penalty imposed as a punishment for bribery at an election. The Dominion Elections Act, 1874, by sect. 109, provides that all penalties and forfeitures (other than fines in cases of misdemeanour) imposed by the Act, shall be recoverable, with full costs of suit, by any person who will sue for the same, by action of debt or information, in any of Her Majesty's Courts in the Province in which the cause of action arose, having competent jurisdiction:—*Held* that this enactment was valid.—*Doyle v. Bell*.—C.A., Ont. . . . . iii. 297

4. Where land then forming part of the Ordnance lands of the old Province of Canada had been granted to the corporation of the city of Toronto in the year 1858, it was held that after the passing of the British North America Act the power to vary the trusts contained in the grant was vested in the Legislature of the Province and not in the Parliament of the Dominion.—*Kennedy v. City of Toronto*.—Ch. D., Ont. . . . iv. 649

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Provincial Courts —*Power to impose duties on.*] The Parliament of the Dominion of Canada has power to impose new duties upon existing Provincial Courts, and to give them powers as to matters coming within the classes of subjects over which the Dominion Parliament has jurisdiction, consequently the Dominion Controverted Elections Act of 1874 (Canadian Stat. 37 Vict. c. 10), which confers upon the Provincial Courts jurisdiction with respect to elections to the Dominion House of Commons, is valid. Special leave refused to appeal from two concurrent judgments of the Courts in Canada, affirming the competency and validity of the said Act of 1874; it appearing to the Judicial Committee of the Privy Council that there was no substantial question requiring to be determined, none of their Lordships having any doubt of the soundness of the judgments, though several judges of the first instance has held the Act to be invalid.—*Valin v. Langlois*.—P.C. i. 158

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See QUEEN'S COUNSEL.

Provincial Legislatures.—By the Statutes of the Quebec Legislature, 31 Vict. c. 32, and 32 Vict. c. 29, Fire Commissioners or Marshals were appointed, with power to investigate the origin of any fires occurring in the cities of Quebec and Montreal; to compel the attendance of witnesses, and examine them on oath; and to commit to prison any witnesses refusing to answer without just cause: *Held*, that these Statutes were within the competency of the Provincial Legislature. On petition



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by the Attorney-General of the Province of Quebec, special leave was granted to appeal from a judgment of the Queen's Bench, Quebec, on a case reserved in a trial for felony.—*The Queen v. Coote*.—P.C. . . . . i. 57

2. A Provincial Legislature of Canada has no power to pass an Act transferring to a new company, or otherwise, a federal railway, with its appurtenances, property, rights and powers, or to dissolve a federal company, or to substitute for it a company to be governed by, and subject to provincial legislation.—*Bourgoin v. La Compagnie du Chemin de Fer de Montreal, Ottawa et Occidental*.—P.C. . . i. 233

3. The first step to be taken with a view to test the validity of an Act of a Provincial Legislature under the B. N. A. Act is to consider whether the subject-matter of the Act falls within any of the classes of subjects enumerated in section 92, which states the legislative powers of the Provincial Legislatures. If it does not come within any of such classes, the Provincial Act is of no validity. If it does, these further questions may arise, viz., whether the subject of the Act does not also fall within one of the enumerated classes of subjects in sect. 91, which states the legislative powers of the Dominion Parliament, and whether the power of the Provincial Legislature is or is not thereby overborne.—*Dobie v. Temporalities Board*.—P.C. . . . . i. 351

4. A testator had devised the residue of his estate in trust for such of his children as should be living at the decease of his widow, and for the children of any of them who should then be dead. Before the widow's death, and on her application and that of the testator's children (all of whom

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were living), the Provincial Legislature of Ontario passed an Act (34 Vict. c. 99) for dividing the property among the testator's children forthwith: *Held*, that such an Act was within the competence of the Provincial Legislature; but the Court held further (Draper, C.J., and Spragge, C., dissenting) that the testator's grandchildren, not having been expressly named in the Act, and there being no express and explicit enactment specifically referring to and barring their rights, their interests remained unaffected by the Act.—*Re Goodhue*.—C.A., Ont. i. 560

5. Provincial Legislatures are not restricted to legislation respecting property such as bonds held in the Province, and where debts and other obligations are authorized to be contracted under a local Act, passed in relation to a matter within the power of a Local Legislature, such debts may be dealt with by subsequent Acts of the same Legislature, notwithstanding that by a fiction of law they may be domiciled out of the Province.—*Jones v. Canada Central Railway Co.*—Q.B., Ont. . . . . i. 777

6. Provincial Legislatures have, as incident to their express powers under the B. N. A. Act, the right to summon witnesses, and to punish persons who disobey such summons, this right being necessary to the proper exercise of their powers of legislation, and the control assigned to them in respect to the administration of public affairs. The provisions of the Act of the Quebec Legislature, 25 Vict. c. 5, regulating this right are valid. Ramsay, J., dissenting.—*Ex parte Dansereau*.—Q. B., Quebec . . . . . ii. 165

7. A Provincial Legislature has authority to determine the age or

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other qualifications which shall be required on the part of persons resident in the Province to entitle them to manage their own affairs, or to exercise certain professions or branches of business attended with danger or risk to the public. If laws on these subjects incidentally affect trade and commerce, this incidental power must be deemed to be included in the right to deal with those matters which are specially placed under provincial control. The Quebec Pharmacy Act of 1875, so far as it requires certain qualifications on the part of persons exercising the business of selling drugs and medicines, is valid. The Provincial Legislatures have the right to appropriate fines to municipal or other corporations.—*Bennett v. Pharmaceutical Association of Quebec*. — Q. B., Quebec. . . . . ii. 250

8. A Provincial Legislature is entitled to legislate with a view to regulate within the Province the sale of whatever may injuriously affect the lives, health, morals, or well-being of the community, whether it be intoxicating liquors, poisons or unwholesome provisions, if such legislation is made bona fide with the object of regulation alone, even though to a certain extent trade and commerce are affected thereby.—*Keefe v. McLennan* — Supreme Ct, N.S. ii. 400

9. The Nova Scotia House of Assembly has statutory power to adjudicate that wilful disobedience to its order to attend in reference to a libel reflecting on its members is a breach of privilege and contempt, and to punish that breach by imprisonment. In an action for assault and imprisonment against members of the Assembly who had voted for the plaintiff's imprisonment: *Held*, that the sections of the local Revised Statutes, 5th series, c. 3,

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which create the jurisdiction of the House and indemnify its members against legal proceedings in respect of their votes therein, are a complete answer to an attempt to enforce civil liability for acts done and words spoken in the House. Those sections, except so far as they may be deemed to confer any criminal jurisdiction, otherwise than as incident to the protection of members, are intra vires of the Local Legislature, as relating to the constitution of the Province within the meaning of section 92 of the British North America Act, 1867, or under the authority of section 5 of the Colonial Laws Validity Act (28 & 29 Vict. c. 63), which was recognised by the Act of 1867, section 88 — *Barton v. Taylor*, (11 App. Cas. 197) distinguished. — *Fielding v. Thomas*.—P. C . . . . . v. 398

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**Queen's Counsel.**—*Appointment of.*] A Provincial Legislature has no power to authorize the Lieutenant-Governor to appoint Queen's Counsel, or to grant to



any member of the Bar a patent of precedence in the Courts of the Province. (Henry, Taschereau and Gwynne, JJ.) The question arose on an appeal by Queen's Counsel appointed by the Lieutenant-Governor under Acts of the Provincial Legislature, the respondent being a Queen's Counsel appointed by the Governor-General; and Strong, Fournier and Taschereau, JJ., were of opinion that the Provincial Acts under which the appellants were appointed were not intended to affect the precedence of Queen's Counsel appointed by the Governor-General; and it was therefore held, Per Strong and Fournier, JJ.:—That as this Court ought never, except in cases when such adjudication is indispensable to the decision of a cause, to pronounce upon the constitutional power of a Legislature to pass a statute, there was no necessity in this case for them to express an opinion upon the validity of the Acts in question.—*Lenoir v. Ritchie*.—Supreme Ct., Can. i. 488

**Railways.**—Where it is necessary for a Provincial railway in Ontario to cross a Dominion railway, the company desiring to effect such crossing must procure the approval of the Commissioner of Public Works for Ontario, as well as the approval of the Railway Committee of the Privy Council of the Dominion; and the railway companies cannot by agreement waive this provision.—*Credit Valley Ry. Co. v. Great Western Ry. Co.*\*—Chy, Ont. . . . i. 822

2. The Province of Ontario passed an Act to make provision for the safety of railway employees and the public, such provision having reference to the construction and maintenance of railway frogs, etc. Per Spragge, C. J.,

a Provincial Legislature has no power to pass such a law with reference to a Dominion railway situate locally within the Province. The other Judges of the Court of Appeal expressed no opinion upon the point, being of opinion that the Act was not intended to apply to Dominion railways, and for that reason did not apply to the Dominion railway company in question.—*Monkhouse v. Grand Trunk Railway*.—C. A., Ont. . . . iii. 289

3. The Ontario Legislature by Rev. Stat. 1887, c. 141, gives to workmen injured in the course of their employment, the right, under certain conditions, to recover compensation therefor from their employers: *Held*, that this enactment was valid and applied to the defendant company as well as other railways under the legislative control of the Dominion Parliament.—*Canada Southern Ry. Co. v. Jackson*.—Supreme Ct. Can. . . . . iv. 451

4. The Dominion Parliament having by a general railway Act, applicable to all railway companies over which the Parliament had jurisdiction, limited to six months the time for bringing actions against railway companies for any injury caused by reason of the railway: *Held*, by Hagarty, C.J., and Osler, J.A., affirming the judgment of Street, J. (Burton and Maclellan, JJ.A., dissenting), that this enactment was valid.—*McArthur v. Northern and Pacific Junction Ry. Co.*—C.A., Ont. iv. 559

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**Taxation.**—An Act of the Provincial Legislature of New Brunswick (33 Vict. c. 47), intituled “An Act to authorize the issuing of debentures on the credit of the lower District of the Parish of St. Stephen, in the County of Charlotte,” which empowered the majority of the inhabitants of that parish to raise, by local taxation, a subsidy designed to promote the construction of a railway extending beyond the limits of the Province, but already authorized by statute, was held to be within the legislative capacity of the Legislature. A Provincial Legislature can, under the B. N. A. Act, sect. 92, art. 2, impose direct taxation for a local purpose upon a particular locality within the Province. The Act in question was held to relate to a matter of “a merely local or private nature in the Province,” which, by the 92nd section of the B. N. A. Act is assigned to the exclusive competency of the Provincial Legislature, and not to relate to a railway or any local work or undertaking within the excepted subjects mentioned in art. 10, subsect. (a) of the said section.—*L’Union St. Jacques de Montreal v. Belisle*, (L.R. 6 P.C. 31) approved.—*Dow v. Black.*—P. C. . . . i.

2. The clauses of the Act, 39 Vict. c. 7 (passed by the Legislature of Quebec) which impose a tax upon certain policies of assurance and

certain receipts and renewals, are not authorized by the B. N. A. Act, 1867, sect. 92, sub-ss. 2, 9. A License Act by which a licensee is compelled neither to take out, nor pay for a license, but which merely provides that the price of a license shall consist of an adhesive stamp, to be paid in respect of each transaction, not by the licensee, but by the person who deals with him, is virtually a Stamp Act and not a License Act. The imposition of a stamp duty on policies, renewals and receipts with provisions for avoiding the policy, renewal or receipt in a Court of Law, if the stamp is not affixed is not warranted by the terms of an Act which authorizes the imposition of direct taxation.—*Attorney-General for Quebec v. Queen Insurance Co.*—P. C. . . . . i. 117

3. A Provincial Legislature cannot impose a tax upon the official income of an officer of the Dominion Government or confer such a power upon the municipalities.—*Leprohon v. City of Ottawa.*—C.A., Ont. . . . . i. 592

4. *Held*, that Quebec Act (43 & 44 Vict. c. 9) which imposed a duty of ten cents upon every exhibit filed in Court in any action depending therein, is ultra vires of the Provincial Legislature.—*Attorney-General of Quebec v. Reed.*—P. C. . . . . iii. 190

5. The Local Legislature has authority to enact a law imposing a tax on the Dominion notes held by a bank as a portion of its cash reserve under the Dominion Act relating to “Banks and Banking” (34 Vict. c. 5, s. 14).—*Windsor v. Commercial Bank of Windsor.*—Supreme Ct., N.S. . . . iii. 377

6. *Held*, that Quebec Act, 45 Vict. c. 22, which imposes certain direct taxes on certain commercial corporations carrying on business in the Province is intra vires of the



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Provincial Legislature. A tax imposed upon banks which carry on business within the Province, varying in amount with the paid-up capital and with the number of its offices, whether or not their principal place of business is within the Province, is direct taxation within clause 2 of sect. 92 of the B. N. A. Act, 1867, the meaning of which is not restricted in this respect by either clause 2, 3 or 15 of sect. 91. Similarly with regard to insurance companies taxed in a sum specified by the Act—*Bank of Toronto v. Lambe*.—P. C. . . . . iv. 7

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**Temperance Act of 1864.**  
—The B. N. A. Act in assigning to the Parliament of Canada the exclusive legislative authority over “the regulation of trade and commerce,” did not thereby repeal the Temperance Act of 1864, of the late Province of Canada, 27-28 Vict. c. 18, and did not deprive municipal corporations of the power thereby given to prohibit the sale of intoxicating liquors.—*Noel v. Corporation of the County of Richmond*.—Q.B., Quebec. . . . . ii. 246

2. A Provincial Legislature cannot repeal or modify those sections of the Temperance Act of 1864 (27, 28 Vict. c. 18), which conferred on Municipal Councils the power to pass by-laws for prohibiting the sale of intoxicating liquors.—*Hart v. Corporation of the County of Missisquoi*.—Circuit Court, Quebec. . . . . ii. 382

*Cooley v. Municipality of Brome*.—Circuit Court, Quebec. . . . . ii. 385

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3. The Temperance Act of 1864, of the late Province of Canada, prohibited the sale of liquors by retail wherever the Act was brought into force and provided special proceedings and punishments for offences against the Act; the Provincial Legislature of Ontario afterwards enacted that the sale of liquor in such localities should also be a contravention of the Provincial Acts for selling without a license; these Acts provided other punishments and proceedings: *Held*, that under the Temperance Act the matter was one of criminal law; and that the legislation of the Provincial Legislature was ultra vires.—*Regina v. Prittie*.—Q.B., Ont. . . . . ii. 606

*Regina v. Lake*.—Q.B., Ont. ii. 616

4. Acts of the Ontario Legislature, provided that Local Boards of Commissioners, and Inspectors appointed by the Lieutenant-Governor, should perform certain duties in their respective localities for the enforcement of the statute of the late Province of Canada, called “The Temperance Act of 1864;” and that a certain proportion of the expenses attending the execution of these duties should be paid by the municipalities concerned. The Temperance Act provided for prosecution by private persons, as well as others, for offences against the Act: *Held*, that the Ontario enactments were within the competence of the Legislature. An enactment of an ex post facto character by a Provincial Legislature is not void on that ground.—*License Commissioners of Prince Edward v. County of Prince Edward*.—Chy., Ont. . . . . ii. 678

5. A Provincial Legislature cannot repeal those sections of the Temperance Act of 1864, which relate to the prohibition of the sale of intoxicating liquors.—*Grif-*

*fith v. Rioux.*—Superior Ct., Quebec . . . . . iii. 348

**Trade and Commerce.**—The power of the Dominion Parliament for the regulation of trade and commerce includes political arrangements in regard to trade, and regulations of trade in matters of inter-provincial concern, and may, perhaps, include general regulations affecting the whole Dominion, but it does not comprehend the power to regulate the contracts of a particular business or trade (such as the business of fire insurance) in a single Province. An Act of the Province of Ontario to secure uniform conditions in policies of fire insurance was held to be within the power of a Provincial Legislature over "property and civil rights." Such an Act, so far as relates to insurance on property within the Province, may bind all fire insurance companies, whether incorporated by Dominion, Provincial, Colonial or Foreign authority. A Dominion Act having required insurance companies to obtain licenses from the Minister of Finance as a condition of their carrying on the business of insurance in the Dominion, neither the Act, nor the fact of a company having obtained such license, was held to withdraw the company from the operation of the Provincial Act.—*Citizens and Queen Insurance Companies v. Parsons.*—P. C. . . . . i. 265

2. An Act which authorized the Corporation of the City of Montreal to impose a license tax on butchers keeping stalls or shops in the city for the sale of meat, fish, etc., elsewhere than on the public markets, was held not to be ultra vires of the Provincial Legislature, as an interference with trade and commerce.—*Angers v. City of Montreal.*—Superior Ct., Quebec. . . . . ii. 335

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